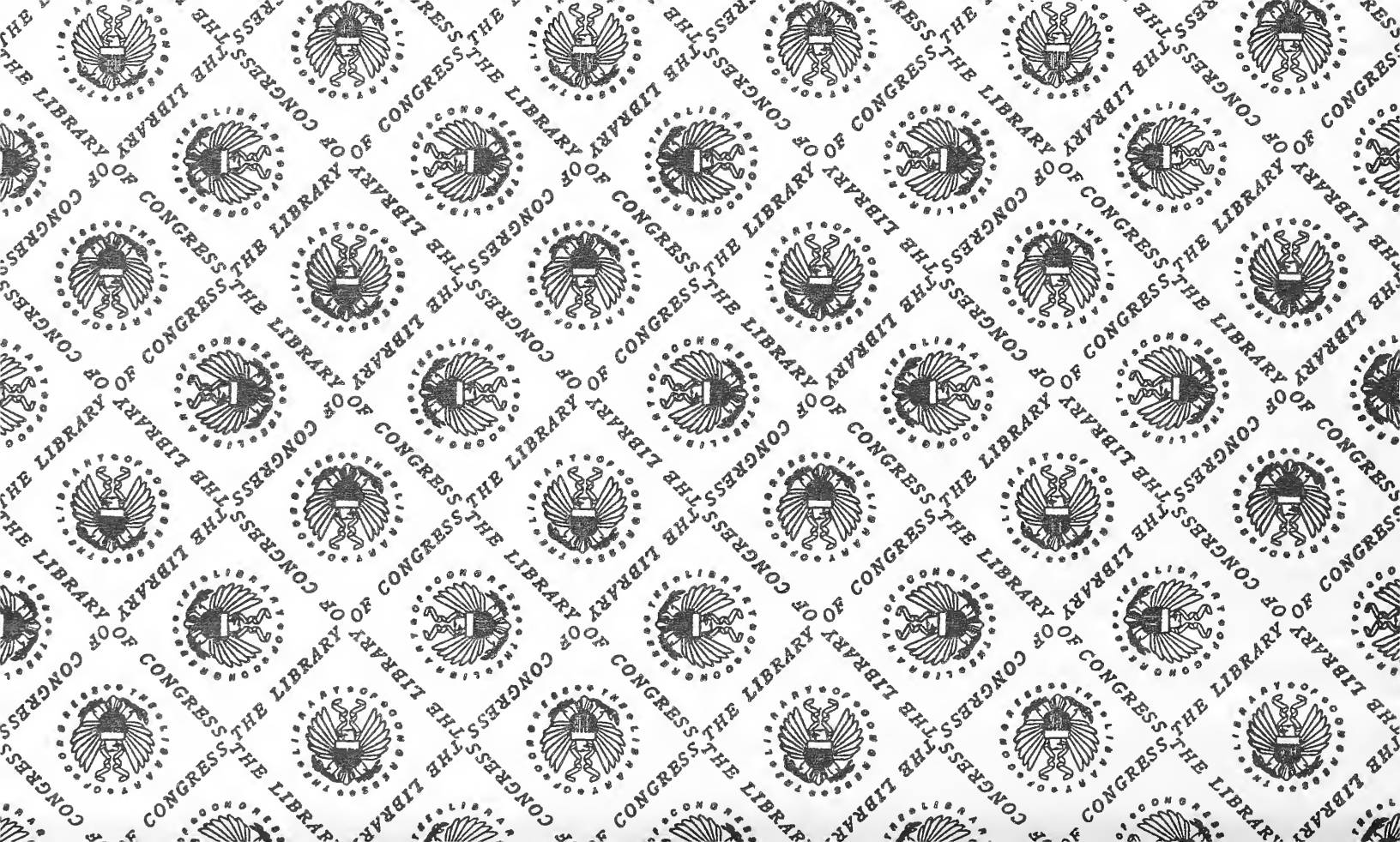
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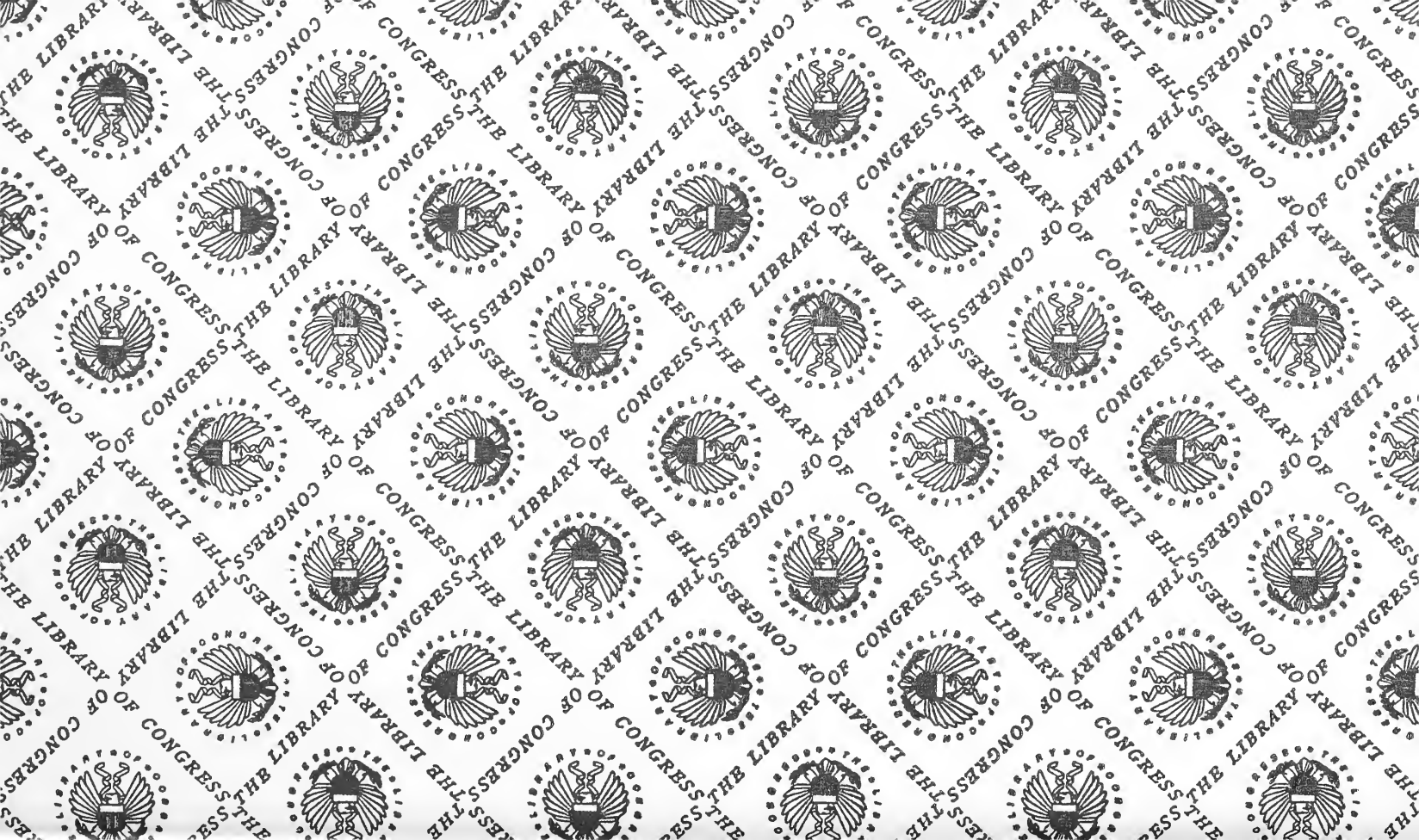
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COSTA RICA-PANAMA ARBITRATION

SYNOPSIS OF CASE AND ARGUMENT FOR COSTA RICA IN REPLY

BY

CHANDLER P. ANDERSON

WASHINGTON, D. C.
PRESS OF GIBSON BROTHERS, INC.
1914.

SYNOPSIS OF THE CASE

OF

COSTA RICA.

THE QUESTION SUBMITTED.

The treaty of March 17, 1910, between Costa Rica and Panama, under which this arbitration is held, submits for the decision of the Honorable Arbitrator the following question:

> What is the boundary between Costa Rica and Panama under and most in accordance with the correct interpretation and true intention of the Award of the President of the French Republic made the 11th of September, 1900?

In Article I of the treaty it is recited that the High Contracting Parties consider that the boundary between their respective territories designated by this Award "is clear and indisputable in the region of the Pacific from Punta Burica to a point beyond Cerro Pando on the Central Cordillera near the ninth degree of north latitude," and no question, therefore, with respect to this portion of the line is raised in this arbitration.

It is further recited in Article I of the treaty that the High Contracting Parties "have not been able to reach an agreement in respect to the interpretation which ought to be given to the Arbitral Award as to the rest of the boundary line;" and under the terms of submission, therefore, the Honorable Arbitrator is called upon to determine where this portion of the boundary line should be located "under and most in accordance with the correct interpretation and

true intention of the Award of the President of the French Republic made the 11th of September, 1900."

The terms of the Award, so far as they relate to the portion of the boundary in dispute, are as follows:

> The frontier between the Republics of Colombia and Costa Rica shall be formed by the spur (counterfort) of the Cordillera which starts from Cape Mona, on the Atlantic Ocean, and closes on the north the valley of the River Tarire or River Sixaola; thence by the chain of the watershed between the Atlantic and Pacific to about the ninth parallel of latitude.

The same Article of the treaty which formulates the question submitted to arbitration further provides that—

> In order to decide this the Arbitrator will take into account all the facts, circumstances, and considerations which may have a bearing upon the case, as well as the limitation of the Loubet Award expressed in the letter of His Excellency Monsieur Delcassé, Minister of Foreign Relations of France, to His Excellency Señor Peralta, Minister of Costa Rica in Paris, of November 23, 1900, that this boundary line must be drawn within the confines of the territory in dispute as determined by the Convention of Paris between the Republic of Costa Rica and the Republic of Colombia of January 20, 1886.

THE TRUE INTENTION OF THE LOUBET AWARD.

The letter of Minister Delcassé of November 23, 1900, to which reference is made in the above quotation, was written in reply to a request from Señor Peralta for a more precise definition of the location of the line under the Award, in view of the fact that unless the Award was interpreted to mean that the line should follow the Yorquín instead of the Tarire River, it would include within the

region granted to Colombia territory not in dispute, which would be a positive violation of the terms of submission, and therefore could not have been the intention of the President of the French Republic. Minister Delcassé, speaking on behalf of the President of the French Republic, and recognizing the limitations which had been imposed upon him by the terms of the arbitration, explained that owing to the lack of precise geographical data the Arbitrator had not been able to fix the frontier except by means of general indications. He also admitted that there was no doubt, as Señor Peralta had observed, "that in conformity with the terms of Articles 2 and 3 of the Convention of Paris of January 20, 1886, this frontier line must be traced within the limits of the territory in dispute, as they are found to be from the text of said Articles." He therefore pointed out in conclusion that—

> It is according to these principles that the Republics of Colombia and Costa Rica will have to proceed to the material determination of their frontiers, and the Arbitrator relies, in this particular, upon the spirit of conciliation and good understanding which has up to this time inspired the two interested governments.

This letter was clearly intended to open a way for the two governments by mutual agreement, in a spirit of conciliation and good understanding, to revise and correct the Award if it should be found that it exceeded the limits imposed by the terms of submission; and the statement in this letter that the Arbitrator had not been able to fix the frontier except by means of general indications, certainly introduces an element of uncertainty which gives a wide scope in interpreting the meaning of the Award.

Articles 2 and 3 of the Convention of Paris of January 20, 1886, which are referred to as imposing limitations upon

the Award, and which were confirmed and ratified by the treaty of 1896 under which the Award was made, are as follows:

> ARTICLE 2. The territorial boundary which the Republic of Costa Rica claims, on the Atlantic side, reaches as far as the Island of the Escudo de Veragua and the River Chiriquí (Calobébora) inclusive; and on the Pacific side as far as the River Chiriquí Viejo, inclusive, to the east of Punta Burica. The territorial boundary which the United States of Colombia claims reaches, on the Atlantic side, as far as Cape Gracias a Dios, inclusive; and on the Pacific side, as far as the mouth of the River Golfito, in the Gulf of Dulce.
>
> ARTICLE 3. The Arbitral Award must be confined to the territory disputed which lies within the extreme limits already stated, and it cannot in any way affect the rights which a third party, who has not intervened in the arbitration, may allege to the ownership of the territory included within the boundaries indicated.

It will be observed that Article 2 merely fixes the terminal points upon the Atlantic and Pacific of the boundary claimed by the respective parties, while Article 3 imposes an additional limitation which confines the Award to the disputed territory within these extreme limits. In other words, the scope of the Award was confined not merely to territory within the extreme limits stated in Article 2, but to territory within those limits which was actually in dispute in 1886, when that treaty was made.

It therefore becomes evident at the outset that the Award must be interpreted so as not to extend the boundary beyond the territory which was actually in dispute between Costa Rica and Colombia at the time the treaty of 1886 was entered into.

THE POWERS OF THE PRESENT ARBITRATOR.

It is also evident that the present terms of submission contemplate the adoption of an entirely different line from that indicated in the Award in case the general indications, by means of which the Award describes the boundary, cannot be followed, either because they would carry the line beyond the limits of the disputed territory, or because the precise geographical data now before the arbitrator, the lack of which compelled the former arbitrator to confine himself to "general indications" in describing the boundary, prove that the geographical conditions do not support the assumptions upon which these general indications were based.

If for these reasons, or for any other reasons disclosed by the facts presented in this case, the Award is found to be defective, the present arbitrator is at liberty to interpret the Award in such a way as to fix the line in accordance with the merits of the question, disregarding any complications growing out of imperfections in the Award, as it is not to be presumed that the Award of the President of the French Republic could have had any other intention than this. That this was the intention of the terms of submission, is evident from the provision above quoted that in order to decide the question submitted "the arbitrator will take into account all the facts, circumstances, and considerations which may have a bearing upon the case, as well as the limits of the Loubet Award expressed in the letter of His Excellency Monsieur Delcassé" etc.

THE LIMITS OF THE TERRITORY IN DISPUTE.

In considering the question of what territory was in dispute between Colombia and Costa Rica antecedent to their Treaty of 1886 for the purpose of determining the

limitation thereby imposed upon the scope of the Award, it is necessary to understand at the outset that this question relates to two entirely different sections of territory, each of which has a distinctly different historical and legal status.

One of these sections consists of the portion of the so-called Mosquito Coast extending toward the south from Cape Gracias a Dios, which marked about the center of that coast, and the other of these sections comprises a strip of territory extending between the Pacific and Atlantic Oceans to the eastward of a line running from the mouth of the River Golfito on the Pacific side to the mouth of the Sixaola River on the Atlantic. It will be observed that the extreme points of these two sections are those fixed in the treaty of 1886 as the extreme points of the boundary claimed by Colombia—*i. e.* Cape Gracias a Dios on the Atlantic side, and the mouth of the River Golfito on the Pacific side. The location of the line claimed by Colombia between these two points was not described in terms in that treaty, but all uncertainty as to its location was removed by the supplemental provision of that treaty limiting the scope of the Award to the territory then in dispute between the two governments. The evidence produced on behalf of Costa Rica in this case shows that up to that time Colombia had never asserted a claim against Costa Rica for any territory beyond the limits of the two sections above described, and as a matter of fact Colombia had never formally asserted a claim against Costa Rica for the possession of any territory on the Atlantic coast beyond the mouth of the Sixaola River. Costa Rica certainly did not understand that any such claim was outstanding at that time or in any way involved in the issues presented by that treaty. Furthermore when

the President of France was asked and agreed to act as arbitrator under the treaty of 1896, he was furnished by Costa Rica with a map on which was marked a line showing that no territory to the northward of the mouth of the Sixaola River was regarded as in dispute at that time. This map and the letter of June 9, 1897, with which it was transmitted, from Señor Peralta to the French Minister of Foreign Affairs, were made part of the Case of Costa Rica in that arbitration and were acquiesced in without question by Colombia.

THE MOSQUITO COAST.

The reason that Cape Gracias a Dios was inserted in this treaty by Colombia as the extreme point of the boundary claimed by it on the Atlantic Coast was unquestionably because of the desire of that Government not to prejudice or relinquish by implication the possibility of establishing in the future a claim to that part of the Nicaraguan coast adjacent to the mouth of the San Juan River on the ground that it was part of the Mosquito coast; for Colombia was very anxious if possible to secure or at least participate in the control of the Atlantic end of the proposed Nicaraguan Canal in addition to the control it then exercised over the Panama Canal route. On the other hand Costa Rica permitted Cape Gracias a Dios to be named as the extreme point of the boundary claimed by Colombia for several reasons, the most important of which were: first, because the point thus named was not in Costa Rican territory, and therefore was outside of the scope of the arbitration under this treaty, which expressly provided that the rights of third parties could not in any way be affected, and in the second place because it was well understood that the boundary claimed by Colombia

as far as Cape Gracias a Dios related only to the so-called Mosquito Coast which had never comprised any of the territory of Costa Rica, being limited, as is conclusively shown by the evidence presented in this case, to a portion of the Atlantic littoral of Nicaragua north of Punta Gorda, which is more than ten leagues above the San Juan River. Moreover, Colombia's claim to the Mosquito Coast was known to be without valid legal basis, and as is stated above, Colombia had never raised as a distinct issue with Costa Rica, by formal assertion or demand, any claim to any portion of Costa Rican territory, northward of the Sixaola River,—certainly no such claim was at issue between them in 1886; consequently, even if the Mosquito Coast was regarded as including any part of the Atlantic littoral of Costa Rica, it was not strictly speaking territory in dispute between the two countries within the meaning of the treaty of 1886.

The basis of Colombia's pretensions to a part of the so-called Mosquito Coast was a Royal Order of 1803 which provided that "the *part* of the Mosquito Coast from Cape Gracias a Dios, inclusive, toward the River Chagres, shall be segregated from the Captaincy-General of Guatemala, and be dependent on the Viceroyalty of Santa Fe." Colombia claimed to be entitled to possession as the successor to the Viceroyalty of Santa Fe. It will be found, however, from an examination of the arguments and evidence submitted in the case for Costa Rica, that this order never had the effect claimed for it by Colombia, having been adopted for military and not governmental purposes, and the occasion for it having soon thereafter ceased, it never became operative and was always afterwards disregarded, and in any event was superseded and abrogated by a Royal Order of 1806, which

retained the Mosquito Coast under the dependency of Guatemala.

In this connection attention is called to the very able and valuable opinion of the learned Spanish jurists, Señor Don Segismundo Moret y Prendergast and Señor Don Vicente Santamaría de Paredes, who have examined the question of the boundary between Costa Rica and Panama with reference to the Spanish Colonial law, at the request of the Government of Costa Rica, which opinion is now presented as part of the Case of Costa Rica.

It is further shown that the lower end of the Mosquito Coast never extended as far as the northern border of Costa Rica, and that Cape Gracias a Dios was about midway between the upper and lower extremities of that coast. It is also shown that the use of the words "toward the River Chagres" in the Order was not intended to and did not in fact extend the Mosquito Coast along the Atlantic littoral to that river, because the word "toward," as used in that Order, did not mean "as far as," but was merely intended to signify direction, as if that Order had read "that part of the Mosquito Coast below Cape Gracias a Dios," in distinction from the part above that point.

THE LAW APPLICABLE.

It is also proved in this case that Colombia had neither actual nor constructive possession of any part of the Mosquito Coast during its colonial period, or after its independence from Spain was established, so that the principle of *uti possidetis* universally adopted in South and Central America for the determination of boundaries could not be invoked by Colombia with reference to the Mosquito Coast. Colombia's claim to that coast rested wholly upon the Order of 1803, and for that reason Colombia

sought to modify the principle of *uti possidetis* by adding the words "*de jure*," so as to bring within its application a mere claim of right to possession in distinction from a claim based upon actual possession. Even under this modification of the *uti possidetis* principle, however, proof of the validity and continuance of the Order of 1803 down to and after Colombia's separation from Spain was essential to establish even a *prima facie* claim by Colombia to the Mosquito Coast.

Under these circumstances it is incredible that Colombia could ever have hoped to sustain this claim to the Mosquito Coast. Even if the Order of 1803 had not been revoked in 1806 it was always subject to revocation and it stands to reason that when Colombia achieved her independence after revolting from Spain in 1810, she ceased to have any further claim on the Mosquito Coast under the Order of 1803, for a revocable order, such as that was, could not under any principle of law be regarded as thereafter continuing in force for the purpose of transferring to a revolting colony territory situated in a loyal colony, and actually in the possession and control of Spain.

FAILURE OF COLOMBIA'S CLAIM.

It follows as a necessary conclusion from the evidence produced on behalf of Costa Rica that Colombia's claim of right to possession of the Mosquito Coast furnished no justification for extending the Colombian boundary to the north of the Sixaola River, even if the Royal Order of 1803 could be construed as carrying the Mosquito Coast south of the Nicaraguan boundary and along the Costa Rican littoral on the Atlantic. That President Loubet reached this conclusion is shown by the Award itself, which in express terms decides that the territory of Colombia

(Panama) shall not extend beyond Punta Mona on the Atlantic Coast, and that islands in proximity to the coast "situated to the west and to the northwest of the said Punta Mona shall belong to the Republic of Costa Rica." The Award also in express terms refers to other islands "more distant from the continent and included between the Coast of the Mosquitos and the Coast of the Isthmus of Panama."

It is evident, therefore, that it was the intention of President Loubet in this Award to decide that Costa Rican territory intervened along the Atlantic littoral between the Mosquito Coast and Panama, thus denying Colombia's claim that the Mosquito Coast extended south of the San Juan River or intervened between Costa Rica and the sea along any part of the littoral south of the Nicaraguan boundary.

It is also clear from the foregoing that in denying this claim President Loubet at the same time deprived himself of any ground which would justify starting the Atlantic end of the boundary at Punta Mona instead of at the mouth of the Sixaola River, for as above stated, apart from the Mosquito Coast claim, the utmost limit of the boundary for which Colombia had contended in the proceedings resulting in the arbitration treaty was the mouth of the Sixaola River.

THE ONLY TERRITORY ACTUALLY IN DISPUTE.

It remains to consider the course of the line claimed by Colombia, prior to the treaty of 1886, from the mouth of the River Golfito on the Pacific side to the mouth of the River Sixaola on the Atlantic, bounding on the westward the other section above mentioned, within which was comprised the territory in dispute between the two Govern-

ments at that time, and beyond which line, under the terms of the treaty the boundary can not be extended into Costa Rican territory.

In view of the character of the boundary of the Loubet Award and the acceptance by both Governments of that portion of it lying on the Pacific side of the Main Cordillera, it is necessary to consider in this connection only that portion of the territory in dispute lying between the Main Cordillera and the Atlantic Coast. Costa Rica admits that all the territory lying to the southeastward of the Sixaola River for its entire length from its mouth to its junction with the Yorquín River, and to the eastward of the Yorquín River from its mouth to its source was territory in dispute at the time the treaty of 1886 was made and within the meaning of Article 3 of that treaty.

Costa Rica denies that any territory to the westward of the Yorquín or to the northward of the Sixaola River was ever claimed by Colombia prior to 1886, or was in dispute between the two Governments at the time the treaty of 1886 was entered into or prior to the arbitration treaty under which the Loubet Award was made. It will be found that this denial is completely sustained by the proofs and arguments presented on behalf of Costa Rica.

THE BOUNDARY UNDER COLONIAL AND INTERNATIONAL LAW.

A boundary existed between Costa Rica and Panama while they were still Spanish provinces for several years after Colombia had declared her independence of Spain, and subsequently, in the latter part of 1821, when they in turn declared their independence the demarcation of the boundary between them as independent states first became an international question, with which question Colombia

was not concerned until the following year. In this connection it should be noted that the demarcation of the boundary between Costa Rica and Panama presents a distinctly different question from that raised by Colombia's claim to the Mosquito coast. The determination of the boundary between Costa Rica and Panama upon their independence was governed then, as it has been ever since, by the principle of *uti possidetis* in 1821, and after Panama had joined the Republic of Colombia and Costa Rica had joined the United Provinces of the Centre of America, this principle was recognized as applicable to that boundary in the treaty entered into in 1825 by those Powers. By this treaty they guaranteed in Article 5—

> the integrity of their respective territories against the attempts and incursions of the subjects of the King of Spain and their adherents, on the same footing in which they were found naturally before the present War of Independence.

And they agreed in Article 7 —

> to respect their limits as they are at present, reserving the making, in a friendly manner, by means of a Special Convention, of the demarcation by a line dividing one State from the other, as soon as circumstances may permit it, or when one of the parties manifests to the other a desire to take up this negotiation.

The boundary line claimed by Costa Rica at that time, and ever since, as representing the real divisional line between Panama and Costa Rica as provinces and between the territories actually possessed by them respectively at the time of their declaration of independence in 1821, was formed, on the Atlantic side of the Main Cordillera, by the Chiriquí or Calobébora River, which empties into the sea

at a point opposite the Escudo de Veragua. The justice of this contention is fully sustained by the above-mentioned opinion of Señores Moret and de Paredes, who have examined the question with reference to Spanish Colonial law.

This line left on the Costa Rican side of the boundary the entire region known as Bocas del Toro, including the bay of that name comprising the Chiriquí Lagoon and the Bay of Almirante, which, as a glance at the map will show, afforded splendid harbor facilities, of immense value even then on account of the scarcity of spacious harbors in that vicinity, and of much greater value in later years in relation to the Panama Canal.

JURISDICTIONAL CONFLICT.

Costa Rica was left in undisturbed and unquestioned possession of all the region to the west of the Chiriquí or Calobébora River, above mentioned, until 1836, when the Congress of New Granada (successor of the Republic of Colombia) decreed the occupation of Bocas del Toro, which was described in that decree as extending along the Atlantic coast as far as the "Culebras" River. There was no river in that region to which the name "Culebras" properly applied in those days, but the river intended in this decree has been demonstrated to be the river called Changuinola on modern maps.

In the following year New Granada adopted another decree organizing a new canton in this Bocas del Toro region, thus demonstrating that it had not been in the possession of New Granada up to that time. These decrees have always been regarded by Costa Rica as an unlawful encroachment upon Costa Rican territory, the usurpation of which was a violation of the above quoted stipulations of the treaty of 1825.

TREATY OF 1841.

While this question was still in the stage of diplomatic discussion, the Federation of Central America dissolved, Costa Rica resuming its independent existence as a separate state (1838), and shortly thereafter Panama separated from New Granada, becoming the Republic of the Isthmus (1840). These two independent states thereupon entered into a treaty, in 1841, of mutual recognition and friendship, by which it was agreed that—

> The state of Costa Rica reserves its right to claim from the state of the Isthmus the possession of *Bocatoro* upon the Atlantic Ocean, which the Government of New Granada had occupied, going beyond the division line located at the Escudo de Veraguas.

Before these two states could reach an agreement on the adjustment of their boundary, as contemplated in this treaty, Panama was again absorbed by New Granada, and the boundary question was thereafter left in abeyance for upwards of fifteen years.

NEO-GRANADIAN CONTENTIONS.

Meanwhile, by way of preparation for the renewal of this discussion, the neo-Granadian Government secured two reports on the subject from Señor Fernández Madrid, an eminent statesman of that Republic, one made by him as a private individual in 1852, and the other prepared by him and adopted in 1855 by the neo-Granadian Senate of which he was a member. These two reports are substantially identical, and the conclusion reached in them is that the "Culebras" River marks the end of the boundary on the Atlantic, but that "as there cannot fail to be noted in one writer or another some dis-

crepancy concerning which of the points stated (Doraces, Culebras or Punta Careta) is the one which in reality does separate the two jurisdictions," it will be admissible for the two governments to deviate from the strictly legal line, and for their accommodation to take another which, without departing in any substantial way from the boundaries indicated, might harmonize more nearly with what was desirable for both countries.

The real interest of New Granada in this boundary question at that time is disclosed by the statement found in these reports that it does not seem impossible to reach an agreement as above suggested "if we confine ourselves to securing our possession of Bocas del Toro and reserving to ourselves a good anchorage in the Gulf of Dulce, being thoroughly convinced that this being settled in a satisfactory manner, all the other points are of entirely secondary interest."

TREATY OF 1856.

In the year 1855 New Granada opened negotiations with Costa Rica for the settlement of this boundary, and in the following year the Treaty of June 11, 1856, was negotiated fixing this portion of the boundary along the middle of the principal channel of the River Doraces from its source to its mouth in the Atlantic. In agreeing to this boundary it was understood on the part of Costa Rica that the Doraces River was the same as the old Estrella, which was called by some geographers the "Culebras," and is now known as the Changuinola on modern maps. This river, it will be remembered, was the same one which, under the name of the Culebras in New Granada's usurpatory decree of 1836, had marked the westernmost extreme on the Atlantic Coast of the Bocas del Toro territory, which at that time was the utmost limit of New

Granada's pretensions. Not content, however, with the extreme concession thus made in this treaty, and at a time when Costa Rica was embarrassed by a foreign war and ravaged by cholera, New Granada sought to force even further concessions from that unhappy country by imposing an interpretation upon this treaty the effect of which would have been to identify the "Doraces" River with "the first river which is found at a short distance to the southeast of Punta Careta," meaning thereby the present Sixaola River. Costa Rica promptly refused to accept this interpretation, and rejected this treaty, which it is important to note never became effective.

TREATY OF 1865.

Upon the failure of the treaty of 1856 Costa Rica decided to regain possession of the region then in dispute, and in the year 1859 took steps providing for the control of the archipelago of Bocas del Toro, by the governor and commander of the Port of Moín, who was authorized to appoint military and police judges in that region, and to expel wrong doers, and exercised other acts of jurisdiction over that region.

As a result of these proceedings, negotiations were undertaken in 1855 between Costa Rica and the Government of the United States of Colombia, then recently established, for the settlement of this question, and on March 30 of that year a treaty was signed by which the boundary of the territory now under consideration was fixed along the main channel of the Cañaveral River from its source to its mouth on the Atlantic. The boundary thus fixed by this treaty was not quite so favorable to Costa Rica as the boundary originally claimed by that country, but it included within

the jurisdiction of Costa Rica the entire Bocas del Toro region which New Granada had sought to obtain under the Treaty of 1856. This boundary has always been recognized as conforming most nearly, both legally and historically to the true boundary, having reference to the principle of *uti possidetis* in 1821 which is controlling in this case. It is worthy of note that the treaty adopting this boundary was approved by the executive power and by the Senate of Colombia, and also on the first reading by the Colombian House of Representatives, and only failed of ratification because its final approval, after a second reading, was left to the legislature for the following year, which rejected it for reasons entirely unrelated to the boundary question.

TREATY OF 1873.

Following the failure to ratify the treaty of 1865, jurisdictional conflicts arose both on the Atlantic and the Pacific side of the territory in dispute, and an attempt was again made to agree upon a treaty settling the boundary, and a treaty for that purpose was finally negotiated in April 1873, by which the section of the boundary now under consideration was fixed along the course of the River Bananos from its source to its outlet in the Bay of Almirante. The line thus fixed was somewhat more favorable to Costa Rica than the line fixed by the Treaty of 1856 along the Doraces or Changuinola River, because the Bananos River lies to the east of that river and empties into Almirante Bay, a part of which was thus reserved to Costa Rica. It was much less favorable, however, to Costa Rica than the Treaty of 1865, and as it was not satisfactory to either country it failed of ratification.

CONTENTIONS AS TO TERRITORIAL POSSESSION PRIOR TO ARBITRATION.

After the failure of this treaty, jurisdictional conflicts were renewed, and it became evident that a settlement of this boundary by agreement would be impossible, and that resort must be had to arbitration. In anticipation of arbitration, and by way of preparation for it, the Colombian Senate adopted on July 13, 1880 a series of conclusions relating to this boundary, only the first and third of which require examination on this point. The first of these conclusions was as follows:

> 1. Colombia has, under titles emanating from the Spanish Government and the uti possidetis of 1810, a perfect right of dominion to, and is in possession of, the territory which extends toward the north, between the Atlantic and Pacific Oceans, to the following line: From the mouth of the River Culebras upon the Atlantic, going upstream to its source; thence a line along the crest of the range of Las Cruces to the origin of the River Golfito; thence the natural course of the latter river to its outlet into the Gulf Dulce in the Pacific.

Costa Rica has never admitted that the name Culebras could properly be applied to the Sixaola River. Contemporaneous occurrences, however, enabled Colombia to claim that in using this name in the extract above quoted, it was intended to apply to the Sixaola River. Costa Rica has always contended, and it seems to have been admitted on the part of Colombia, that the Sixaola River proper extends from its outlet in the Atlantic only up to its junction with the Yorquín, and that from that point up Colombia intended the name Culebras to apply to the Yorquín River in distinction from the Tarire, which joins with the Yorquín and four other tributaries in making the

Sixaola. This construction is sustained by the third conclusion, above mentioned, of the Colombian Senate, which is as follows:

> 3. Colombia has been in the uninterrupted possession of the territory embraced within the limits indicated in Conclusion 1.

This statement clearly identifies the Yorquín and not the Tarire as the upper part of the river to which the name Culebras is applied in the first Conclusion, because Colombia neither up to that time nor since, ever had any sort of possession of the territory to the westward of the Yorquín between it and the Tarire, the possession of which territory had been in the uninterrupted and unquestioned possession of Costa Rica for upwards of three hundred years.

It will be found upon an examination of Costa Rica's case that all of the foregoing statements are fully sustained by the arguments and evidence therein presented, and it will be found further that until after 1870 Colombia had never exercised any jurisdiction over or even had constructive possession of any territory in this region west of the Changuinola River. This was the situation and the extent of Colombia's claims up to the year 1880, when the first treaty for the settlement of this question by arbitration was entered into, and no substantial change took place in the situation, and no attempt was made by Colombia to encroach further upon Costa Rican territory prior to the making of the second arbitration treaty, dated January 20, 1886, which contained in the Third Article the stipulation already quoted providing that the arbitral award must be confined to the disputed territory which lies within the extreme limits already stated.

THE DISPUTED TERRITORY SUBMITTED TO ARBITRATION AND THE SILVELA LINE.

Prior to the treaty of 1886 a *status quo* line resting chiefly upon actual possession had been established, and from that period down to the present time the entire region to the westward of the Yorquín and northward of the Sixaola Rivers has remained continuously in the possession of Costa Rica just as it always had been from the beginning of the Colonial period. There was, therefore, as a matter of fact no difference in the area of the territory in dispute from the date of the arbitration treaty in 1886 down to the date of the Loubet Award, so that the stipulation above quoted from the treaty of 1886 had the same effect whether applied to conditions in 1886 or 1900. Nevertheless in another aspect this stipulation was of great importance and demonstrates the foresight which was shown in adopting it. It was intended to prevent any attempt on either side to bring into the litigation any claims or extend the scope of the arbitration over territory not in dispute at the time the arbitration was agreed upon. Such an attempt was made in presenting Colombia's case in the arbitration before President Loubet, when the representative of Colombia formally demanded on the part of his government a line, known as the Silvela line, starting several miles to the west of the River Golfito, which was fixed by the treaty of 1886 as the extreme limit of the boundary which could be claimed by Colombia, which line he carried from that point due north to its intersection with the Teliri or Tarire River and thence by a straight line slightly to the west of north until it reached the confluence of the Sarapiquí River with the San Juan River.

This so called Silvela line embraced a vast extent of territory which Colombia never before had claimed, and about which there had never been any dispute between the two countries. Clearly Colombia's claim was inadmissible and incompetent to subject that territory to the hazard of arbitration, and that claim, therefore, should have been wholly disregarded by the arbitrator except in so far as it operated to limit rather than extend the area of the territory now claimed. For that purpose it was competent evidence against Colombia as an admission against the interest of that government which would not have been made unless it was true. In this connection, therefore, it should be noted that inasmuch as the Silvela line cuts across a part of the territory which Panama now claims as granted to it under the Loubet Award it is in effect an admission that the Award line included territory not in dispute.

THE DEFECTS OF THE AWARD.

With these considerations in mind, a glance at the map will show that the entire course of the Loubet Award boundary, from Punta Mona to a point near Cerro Pando on the Main Cordillera, lies beyond the Sixaola-Yorquín Rivers, and in fact even beyond the Sixaola-Tarire Rivers, and therefore for its entire length it runs through territory which was not in dispute, and was for that reason, excluded from the scope of that arbitration.

In addition to the defects above discussed, the case presented by Costa Rica shows that the Award of President Loubet is also subject to revision and correction because the presentation of Costa Rica's case was prejudiced by inequality of treatment during the Arbitration proceedings, and that the Award is further defective on account of

uncertainty and ambiguity by reason of the vagueness of its terms, which are confined to general indications, and also by reason of the fact disclosed by the report of the Commission of Engineers that the geographical conditions along the course of the line, as interpreted by Panama, do not support the assumptions upon which these general indications were based.

COSTA RICA'S CONTENTIONS.

In conclusion, therefore, Costa Rica contends that the Loubet Award must be interpreted in such a way as not to fix a line extending beyond even the most extravagant claim made by Colombia, but so as to confine the boundary within at least the limits of the territory actually in dispute as required by the terms of the treaty of 1886.

Costa Rica further contends that, bearing in mind the principle of *uti possidetis* in 1821 as controlling in this case, together with the right of prescription based upon continuous possession by Costa Rica and the entire absence of possession by Colombia or Panama at that time of any of the territory in dispute, or of any of the territory westward of the Changuinola River until very recent years, it would be more in accordance with justice and historical accuracy that a line approaching more nearly the line which both parties agreed to in their Treaty of 1865, or at least in their Treaty of 1873, should now be adopted as the boundary between them. It will be observed that the section of the Loubet Award line on the Pacific side of the Main Cordillera follows very closely the line adopted in those treaties.

ARGUMENT

FOR

COSTA RICA IN REPLY

ARGUMENT FOR COSTA RICA IN REPLY.

I.

IN ORDER TO DECIDE THE QUESTION SUBMITTED TO ARBITRATION, THE TERMS OF SUBMISSION REQUIRE AN EXAMINATION INTO THE MERITS OF THE CONTROVERSY WHICH RESULTED IN THE LOUBET AWARD, IN ACCORDANCE WITH WHICH THE CORRECT INTERPRETATION AND TRUE INTENTION OF THAT AWARD MUST BE DETERMINED.

The Cases presented by Costa Rica and Panama in this arbitration disclose a fundamental and significant difference between the two governments in their respective contentions as to whether or not the merits of the dispute submitted to President Loubet should be examined by the present Arbitrator in order to determine the question now submitted for his decision.

This question is—

> "What is the boundary between Panama and Costa Rica under and most in accordance with the correct interpretation and true intention of the Award of the President of the French Republic made the 11th of September, 1900."[1]

Costa Rica insists that the form of the question itself, which calls upon the Arbitrator to ascertain the correct

[1]Documents Annexed to the Argument of Costa Rica, vol. 2, p. 704.

interpretation and true intention of the Loubet Award, demonstrates the inherent necessity for examining into the merits of the controversy which resulted in that Award, and that this necessity is recognized by the terms of the treaty, which, after stating the question to be decided, expressly provides that "in order to decide this, the Arbitrator will take into account all the facts, circumstances and considerations which may have a bearing upon the case."[1] The words quoted would be meaningless under any other construction of the treaty, and that they have the meaning indicated is admitted by Panama in the statement in her Case that—

> "It would be impossible for the Arbitrator to ignore these things in interpreting the Award and determining its 'true intention.'"[2]

Notwithstanding this admission the position of Panama on the question of examining into the merits of the controversy is stated in her Case as follows:

> "With the original question of boundaries, submitted to President Loubet, we have, then, nothing to do. Upon this arbitration we do not know, and have no occasion to inquire, what were the merits of that controversy, what documents or other proofs were before President Loubet, nor what his reasons were for his decision."[3]

The theory upon which the Case of Panama is presented seems to be that the correct interpretation and true intention of the Loubet Award can be ascertained by an exami-

[1]Documents annexed to the Argument of Costa Rica, vol. 2, p. 704.
[2]Argument of Panama, p. 3.
[3]*Ibid.*, p. 5.

nation of the terms of that Award without inquiring into any of the antecedents or surroundings which influenced that Award, but the Panama Case fails to explain why the parties to this arbitration, if that was their understanding, expressly provided in the treaty that in order to decide the question submitted, the present Arbitrator "will take into account all the facts, circumstances and considerations which may have a bearing upon the case."[1]

That this provision necessarily means an inquiry into the merits of the controversy is further shown by another provision immediately following it in the same clause of the treaty which requires the Arbitrator in order to decide the correct interpretation and true intention of the Loubet Award also to take into account the limitation of the Loubet Award

> "expressed in the letter of His Excellency Monsieur Delcassé, Minister of Foreign Relations of France, to His Excellency Señor Peralta, Minister of Costa Rica in Paris, of November 23, 1900, that this boundary line must be drawn within the confines of the territory in dispute as determined by the Convention of Paris between the Republic of Costa Rica and the Republic of Colombia of January 20, 1886."[1]

These two provisions are given by the treaty precisely the same relation to the determination of "the boundary under and most in accordance with the correct interpretation and true intention of the Award."

In other words if the Award boundary is not justified by reason of any of the facts, circumstances and considerations which may have a bearing upon the case, the

[1]Documents annexed to the Argument of Costa Rica, vol. 2, p. 704.

Award boundary must be reformed, just as it must be reformed if it extends into undisputed territory of Costa Rica.

It is admitted in the Panama Case that—

> "if any part of the line fixed by President Loubet did, in fact, lie outside the limits fixed by the convention of 1886, that part would require modification and it would be necessary for the present Arbitrator to substitute for it such line as he should determine to be 'most in accordance with' what he should find to be the 'true intention' of the Award."[1]

Panama here admits that the Award must be modified if it exceeds the limitation fixed as one of the things which the present Arbitrator must take into account in determining its correct interpretation and true intention. The same result necessarily must follow if the Award fails to conform to the other facts, circumstances and considerations which the Arbitrator is required by the treaty to take into account in determining the correct interpretation and true intention of the Award.

The inherent weakness of Panama's contention on this point is illustrated by the admission in the above quoted extract to the effect that under certain circumstances the Arbitrator would have to substitute for the line of the Award "such line as he should determine to be 'most in accordance with' what he should find to be the true intention of the Award."

Here the contention of Panama completely breaks down, for how can the true intention of the Award be ascertained in the supposed case without an examination into the merits of the controversy?

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[1]Argument of Panama, p. 10.

This difficulty is well illustrated by Panama's interpretation of the meaning of the Award. The Panama Case states that—

> "The question before President Loubet was the fixing of a boundary. For that purpose the only thing of importance was that there should be natural features of the country to define it, if such could be found. Intending to award to Colombia everything south of the north boundary of the watershed of the Sixola and east of the cordillera, the natural boundary was the divide to the north of the Sixola and that formed by the crest of the cordillera."[1]

Costa Rica has shown that this line throughout its entire length runs through the undisputed territory of Costa Rica. It is therefore necessary, in the words of the Panama Case, for the present Arbitrator to substitute for it such line as he should determine to be "most in accordance with" what he should find to be the "true intention" of the Award. According to Panama's case, "for that purpose the only thing of importance was that there should be natural features of the country to define it, if such could be found." The Panama Case further states that "in accordance with the usual practice, at the present day, this boundary follows the summit of successive watersheds."[2] Presumably, therefore, Panama's interpretation of the Award would be, when the divide of the northern watershed of the Sixaola proved to be impossible, that the line should follow the summit of some divide within the disputed territory, but even so, it would be difficult, without going into the merits of the case, to determine whether that divide be the one nearest to the Sixaola river on the south, or the divide of the northern watershed of the

[1] Argument of Panama, p. 23.
[2] *Ibid.*, p. 14.

Changuinola, or whether on the other hand, as contended by Costa Rica the boundary should not preferably follow the course of the Changuinola river.

The same difficulty is found in dealing with the situation presented by the uncertainty, vagueness and ambiguity of the Award description of this boundary, which, as stated by Minister Delcassé,[1] on behalf of President Loubet he had been unable to fix except by means of general indications on account of the lack of exact geographical data, which general indications were based upon assumed geographical conditions, differing radically from the actual conditions as reported by the Commission of Engineers. The Panama Case very properly admits as to this situation that—

> "if an ambiguity should appear, or if, because, in any part, the line cannot be drawn exactly as described in the Award, it becomes necessary for the present Arbitrator to determine the line 'most in accordance with' 'the true intention' of President Loubet, then, to resolve the ambiguity or to determine the 'true intention,' he must, necessarily, and even if the convention had not expressed it, 'take into account all the facts, circumstances and considerations which may have a bearing upon the case.'"[2]

But the Panama Case then proceeds to contend that there is no uncertainty or ambiguity as to the intention of the Award because, although President Loubet was mistaken about the existence of a mountain spur or counterfort bounding on the north the valley of the Sixaola, which would have furnished a barrier forming a convenient international boundary, there still remained the watershed on the north of the Sixaola, the northern limit of which,

[1]Documents Annexed to the Argument of Costa Rica, Vol. 2, Doc. 421.
[2]Argument of Panama, p. 3.

although not furnishing a barrier, was in the neighborhood of where President Loubet assumed the barrier to be, and therefore that the northern divide of this watershed must be assumed to be what President Loubet intended.

According to Panama's contention, all that is required of the present Arbitrator is to record the existence of the undisputed fact that the Sixaola has a watershed on the north, and the further fact that the Commission of Engineers has been able to locate the northern limit of that watershed and to conclude from these facts that the line of the divide thus located was intended to be the boundary, without taking into account any of the many other facts, circumstances and considerations which have a bearing on the case.

If this was all that was required of the Arbitrator by the terms of submission, it would be difficult to explain why the Parties did not call upon the Commission of Engineers to decide the question, instead of submitting it to a distinguished jurist.

The negotiations which resulted in the treaty of arbitration are significant and enlightening on this point. For the ten years intervening between the rendering of the Award and the signing of this treaty, Costa Rica persistently and invariably maintained that the Loubet Award was defective for reasons which would impair its validity and that it could not be accepted unless, as proposed by Minister Delcassé on behalf of President Loubet, the interested Governments in a spirit of conciliation and good understanding could agree upon a mutually acceptable interpretation of the meaning of the uncertain and general indications of the Award.[1]

The United States Government was drawn into the controversy in its early stages to protest against the refusal

[1]Documents Annexed to the Argument of Costa Rica, Docs. Nos. 427, 435, 443, 445, 446, 448, 449.

of Costa Rica to recognize the title to extensive tracts of land on the north side of the Sixaola, which certain United States citizens claimed under grants from Colombia and Panama. Subsequently the United States Government officially recognized that Costa Rica had jurisdiction to the north and Panama had jurisdiction to the south of the *de facto* line which was formed by the Sixaola–Yorquin rivers pending the settlement of the controversy; but at the same time the United States urged arbitration as "apparently the only manner of bringing about the settlement of a controversy the continuance of which bore so heavily on American interests."[1]

Negotiations for arbitration were undertaken, but no progress was made owing to the inability of the two Parties to agree on the question to be submitted. Panama insisted on the acceptance of the Loubet Award as a preliminary to arbitration which she wished to limit to a mere interpretation in a verbal sense of that Award. Costa Rica on the other hand insisted that the question of whether or not the Loubet Award was free from defects impairing its legal force must first be determined, and that the whole boundary question should be reexamined on its merits. In the deadlock thus produced the United States in response to the desire of both Parties that it should lend its good offices in bringing about arbitration, undertook the part of mediator. A communication[2] was thereupon sent by the Secretary of State to the Government of Panama making it clear that—

> "there was no intention to limit the boundary issue between Costa Rica and Panama to the mere interpretation of the Loubet Award; that the United

[1]Documents Annexed to the Argument of Costa Rica, vol. 2, Docs. Nos. 432, 433, 434, 435, 454, 455.
[2]*Ibid.*, Doc. No. 468.

> States Government thinks, and has said, and now repeats that the crucial matter to be submitted to arbitration is the respective contentions of the two Republics, as to the true boundary line."

In this communication surprise was expressed by the Secretary of State that, in view of all the facts, the powers of the Special Minister of Panama, then in Washington on that business, were not full powers but were "restricted to the negotiation of a protocol founded upon the strict acceptance first and above all by both countries of the Loubet Award."[1]

It was further stated in this communication that these powers "are not adequate to the task in hand and are not equivalent to the unrestricted powers of the Minister of Costa Rica, and therefore should be amplified by telegraph in order to secure progress in the negotiations." The Secretary of State added:

> "this Government further feels that its own attitude, assumed before the Special Minister of Panama was accredited, shows that it believed full powers were needed and were confidently awaited in order to settle the real and broad question as to the true permanent boundary, and that the unavailing negotiations with Costa Rica for nearly ten years last past has made it clear beyond peradventure that this long standing controversy cannot be settled by insisting on a mere interpretation of the Loubet Award."[1]

The form of the question finally adopted was understood by Costa Rica to require the Arbitrator to pass upon the real and broad question as to the true boundary which the Secretary of State, as an impartial mediator, had announced was the question to be arbitrated, and the record shows that prior to the adoption of the treaty, the final

[1]Documents Annexed to the Arguments of Costa Rica, vol. 2, Doc. 468.

form of the question submitted to arbitration was favorably recommended to both Parties by the Department of State.[1]

The willingness of the United States to recommend the adoption of this question in its present form is in itself sufficient to show that the United States understood the meaning of the question exactly as it was understood by Costa Rica.

It would have been to the advantage of the United States to have the scope of this arbitration limited to a mere verbal interpretation of the Loubet Award without going into the merits of the boundary controversy, in order to avoid reopening the broader question, because, by reason of treaty arrangements between the United States and Panama, it would be to the advantage of the United States to have all the territory in dispute on the Atlantic coast held by Panama rather than Costa Rica.[2]

It is inconceivable, therefore, that the United States Government, acting the part of a friendly mediator, as is recited in the arbitration treaty, could have recommended to Costa Rica the acceptance of this question in its present form, if it had been understood by the United States as limiting the controversy in any way which would be to the advantage of the United States, and to the disadvantage of Costa Rica.

In view of these considerations Costa Rica contends, as an inevitable conclusion, that under the terms of submission, the merits of the controversy which resulted in the Loubet Award must be examined into as the basis for a correct decision of the question now submitted to arbitration.

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[1]Documents Annexed to the Argument of Costa Rica, vol. 2, Doc. 472.

[2]*Ibid.*, pp. 164–165; p. 474; footnote; Treaty between United States and Panama, 1903, Articles I and XXV, Malloy's Treaties, Conventions, etc., between United States and other Powers, 1776–1909, Vol. 2, p. 1349.

II.

UNDER THE TERMS OF SUBMISSION THE PRESENT ARBITRATOR IS AT LIBERTY TO INTERPRET THE LOUBET AWARD IN ANY WAY NECESSARY TO FIX THE BOUNDARY IN ACCORDANCE WITH THE MERITS OF THE ORIGINAL CONTROVERSY SUBMITTED TO PRESIDENT LOUBET, DISREGARDING ANY COMPLICATIONS DUE TO IMPERFECTIONS IN THAT AWARD.

It has already been established that the terms of submission require the present Arbitrator to examine into the merits of the underlying question of the true boundary between Costa Rica and Panama in order to determine the correct interpretation and true intention of the Loubet Award, and it necessarily follows that having determined the merits of that question the boundary must be laid down in accordance therewith.

It also follows with equal certainty that in doing this any complications or difficulties arising out of defects in the Loubet Award line in conflict with the true line, must be disregarded by the Arbitrator; otherwise there would be no object in examining into the basic question.

It cannot be assumed that President Loubet had any intention of deciding the boundary controversy otherwise than according to its merits, and when the merits of that controversy have been determined, the intention to lay down the line in accordance therewith must be attributed to President Loubet, and his Award under the terms of submission must be so interpreted.

President Loubet himself recognized almost immediately after the Award was rendered that it required revision, and Minister Delcassé, on his behalf, undertook to correct some of its errors and uncertainties by giving it an interpretation which, although contrary to its terms, was in

accordance with the facts, and therefore with what was assumed to have been in the mind of the Arbitrator.

One of these corrections was made by Minister Delcassé in response to a communication from the Minister of Nicaragua at Paris, objecting that by the terms of the Award the Islands of Mangle Chico and Mangle Grande were awarded to Colombia regardless of Nicaraguan ownership of them, which had never been questioned and was expressly excluded from the consideration of the Arbitrator by the arbitration agreement. In reply to this objection, Minister Delcassé undertook to revise the Award as follows:

> "Taking account of the agreement arrived at upon this point between the two Republics in the cause, as well as of the general rules of the Law of Nations, the Arbitrator only had in mind, in referring by name to the islands mentioned in his decision, to establish that the territory of the said islands, mentioned in the treaty concluded March 30, 1865, between the Republics of Coast Rica and Colombia is not included in the dominion of Costa Rica.
>
> "Under these conditions, the rights which Nicaragua can have to the possession of these islands remain entirely as in the past, the Arbitrator not undertaking in any way to determine a question which was not before him."[1]

Here, it will be observed, the express statement of the Award that these islands "shall belong to the United States of Colombia"[2] is given the meaning, by interpretation, that they "are not included in the dominion of Costa Rica."[1]

Again, when the Costa Rican Minister, soon after the Award was rendered, pointed out to Minister Delcassé[3]

[1]Documents Annexed to the Argument of Costa Rica, vol. 2, p. 541.
[2]*Ibid.*, vol. 2, p. 533.
[3]*Ibid.*, vol. 2, Doc. 420.

that the Award required reformation by interpretation in order to prevent carrying the line into undisputed territory of Costa Rica which "would be a positive violation of the terms of the compromise, which limits the attributions of the Arbiter, and of the principles of International Law,"[1] Minister Delcassé replied on behalf of President Loubet as follows:

> "I have the honor to inform you that for lack of precise geographical data, the Arbitrator has not been able to fix the frontier except by means of general indications; I deem, therefore, that it would be inconvenient to trace them upon a map. But there is no doubt, as you have observed, that in conformity with the terms of Articles 2 and 3 of the Convention of Paris of January 20, 1886, this frontier line must be traced within the limits of the territory in dispute, as they are found to be from the text of said Articles.
>
> "It is according to these principles that the Republics of Colombia and Costa Rica will have to proceed to the material determination of their frontiers, and the Arbitrator relies, in this particular, upon the spirit of conciliation and good understanding which has up to this time inspired the two interested governments."[1]

In both of these cases Minister Delcassé's solution was the same—reformation by interpretation.

In the first instance he himself undertook to correct the defects pointed out by the Nicaraguan Minister by giving the Award an interpretation in accordance with what he assumed President Loubet had in mind, in contradiction to what he actually said in the Award.

In the second instance, in order to meet the objection of the Costa Rican Minister that the Award line violated the terms of submission, and also the principles of inter-

[1]Documents Annexed to the Argument of Costa Rica, vol. 2, p. 543.

national law, he in effect called upon the parties themselves to correct any defects in the Award by agreeing upon an interpretation, and at the same time he opened the way for them to give the Award any meaning which they could agree upon. In other words, he pointed out that owing to the lack of precise geographical data President Loubet had been unable to fix the frontier except by means of general indications—so general indeed, that "it would be inconvenient to trace them upon a map," and that the Arbitrator had left it for the parties themselves to proceed to the material determination of their frontier, relying upon the spirit of conciliation and good understanding which had hitherto inspired them.

The present Arbitrator, therefore, will find in what has already been done by President Loubet and Minister Delcassé on his behalf, precedents of great authority for reforming the Loubet Award by interpretation in accordance with the merits of the boundary controversy, rather than by mere verbal interpretation of the language of the Award, and that this was what was intended by the terms of submission in the present arbitration has already been shown in reviewing the negotiations resulting in this treaty.

Diplomatic usage, as well as international courtesy and consideration, required that the question submitted for decision should as a matter of form call for the interpretation rather than the reformation and correction of the Award of the president of a sister republic who, at the invitation of the parties, had undertaken the arduous duty of arbitrating their dispute. Recognizing, however, as the former Arbitrator himself had recognized, that the mere interpretation in a verbal sense would not meet the difficulties presented, the scope of the arbitration was enlarged by permitting the intention attributable to the

former Arbitrator to enter into the interpretation of the Award, in accordance with the precedents he had himself established, and by requiring the present Arbitrator in deciding this question to take into account all the facts, circumstances and considerations which may have a bearing on the case, thus insuring that the Award should be reformed, and the boundary fixed in accordance with the merits of the controversy.

III.

THE AWARD LINE IS DEFECTIVE AND REQUIRES REFORMATION BECAUSE OF ITS UNCERTAINTY AND AMBIGUITY, BECAUSE IT INVADES UNDISPUTED TERRITORY OF COSTA RICA, AND BECAUSE IT IS NOT JUSTIFIED BY THE OTHER FACTS, CIRCUMSTANCES AND CONSIDERATIONS WHICH ARE REQUIRED TO BE TAKEN INTO ACCOUNT IN DECIDING THE QUESTION SUBMITTED.

Costa Rica contends that a line laid down in accordance with the general indications of the Loubet Award, as interpreted by Panama, would not be in accordance with the correct interpretation and true intention of that Award in view of all the facts, circumstances and considerations having a bearing upon the case, which the Arbitrator must take into account in deciding the question submitted.

Among these facts, circumstances and considerations which must be taken into account are the uncertainty and ambiguity of the Award, its disregard of the merits of the controversy submitted to President Loubet, its disregard of the limitations imposed upon the jurisdiction of the Arbitrator, the inequality of treatment to which Costa Rica was subjected during the French arbitration, and the non-existence of certain facts, the assumed existence of which had a controlling influence upon the Arbitrator.

Uncertainty and Ambiguity of the Award.

As stated by the Secretary of State of the United States in the negotiations leading up to the present arbitration, throughout the ten years which had then elapsed since the Loubet Award, "Costa Rica has insisted that the Loubet Award was void in part at least on the ground of *ultra petita* or impaired or vitiated by ambiguity and uncertainty, and that this contention was not in violation of the original agreement of submission which contemplated an award within the defined limit of the claims and not technically void for uncertainty."[1]

This objection of ambiguity and uncertainty is fully discussed in the Case of Costa Rica, and, as therein shown, arises from the failure of the Arbitrator to fix the frontier except by means of general indications owing to the lack of precise geographical data, and the impossibility of accurately tracing these general indications upon a map, and also because these general indications refer to assumed geographical or topographical conditions which do not exist. The contention of Costa Rica in respect of these objections, so far as they apply west of the Sixaola River, has been confirmed by the geographical and topographical data collected by the Commission of Engineers, as appears from the extensive exposition and analysis of their report presented in the Case of Costa Rica.[2] No facts or arguments have been brought forward in the Case of Panama to disturb these contentions, as is shown in the Counter-case of Costa Rica, which contains a full discussion of the position of Panama.[3]

[1]Documents Annexed to the Argument of Costa Rica, vol. 2, p. 692.
[2]Argument of Costa Rica, pp. 281-329.
[3]Counter-case of Costa Rica, pp. 141–190; 203–263.

It also appears from the discussion of these objections in the Case and Counter-case of Costa Rica, that these defects in the Award, as well as other deficiencies therein which will be mentioned later, were undoubtedly due to misinformation on the part of President Loubet about the geographical conditions both as to the topography westward of the Sixaola river and as to the location of that river and the course of the Tarire and Yorquín rivers, and their relation to the Sixaola river.[1]

The suggestion made by Minister Delcassé on President Loubet's behalf, as soon as the defects of the Award were called to his attention, that the parties, should proceed to the material determination of their frontier in a spirit of conciliation and good understanding because he had been unable to do more than indicate it in general terms, makes it evident that in preparing the Award he relied on information which he afterwards realized was incorrect, and that he perceived, in view of the incorrectness of this information, that the Award line proposed by him would have to be revised in order to carry out his real intention.[2]

This situation was the natural outcome of the inequality of treatment of which Costa Rica complained during the course of the arbitration, by reason of which Costa Rica was not informed of numerous maps and documents and other evidence submitted to the Arbitrator by Colombia, and had no opportunity of challenging the accuracy or correcting the inaccuracy of this evidence.[3] Inasmuch as this evidence has not been communicated to Costa Rica, and none of it has been produced by Panama in the present arbitration, there is a strong presumption that on further

[1]Argument of Costa Rica, pp. 362–376, 428–450.

[2]*Ibid.*, p. 435.

[3]Argument of Costa Rica, pp. 152–159; 419–423; Documents Annexed to the Argument of Costa Rica, Vol. 2, Docs. Nos. 409, 410. This counter case, pp. 97–103. Appendix No. 1 to this Counter-case. pp. 104–116.

examination it proved to be unreliable and incorrect, and consequently it may fairly be presumed that it was responsible for President Loubet's mistakes.

Indeed, so far as the maps are concerned, it is stated in the Case of Panama that—

> "By the maps which President Loubet had before him, it appeared, no doubt, that the ridge along the summit of which the line must run in order to attain this result [to award to Colombia the entire watershed of the Sixaola] was visibly continuous from Punta Mona to the cordillera."[1]

The supposed existence of a natural barrier, as erroneously shown on these maps, unquestionably was one of the inducements which led President Loubet to project the boundary line beyond the Sixaola river, and that he must have been misinformed as to the identity of the Sixaola and the location of the Yorquín and the Tarire rivers is the only possible explanation of why he did not forsee that this projected line would invade the undisputed territory of Costa Rica which was beyond his jurisdiction. The reasons for adopting this explanation are convincingly set forth in the Counter-case of Costa Rica at pages 127 *et seq.*

No information about the topography westward of the Sixaola and Yorquín rivers was presented by Costa Rica, for the simple reason that Colombia had never disputed Costa Rica's possession of that territory and it was regarded as wholly outside the scope of that arbitration.

If the information upon which President Loubet relied was received from Colombia, its inaccuracy can easily be accounted for by the fact that Colombia was not then and

[1]Argument of Panama, p. 17.

never had been in possession of any territory beyond the Sixaola-Yorquín rivers.

It is practically certain, as stated in Costa Rica's Counter-case[1] that the arbitrator had before him the map of the French Canal Company of Panama[2] published in 1896, which shows the lands surveyed by the engineers of that Company and those of the Government of Colombia under the concessions secured by this French Company from that Government. These concessions covered a tract of 190,000 hectares called "Sixaula-Róvalo" located along the right side of the Sixaola-Yorquín rivers, and another tract of 109,200 hectares called "Catabella-San Pedro" located near the Chiriquí Lagoon.[3] As stated by the Costa Rican Minister at Washington in his note of April 20, 1893 to the Secretary of State of the United States:

> "The Panama Canal Company, in virtue of a concession of 500,000 hectares of ground of the public domain of Colombia (article 4 of the concession of 1878), thought fit to select nothing less than the territory which is the principal subject of the boundary question in order to solicit its allotment as a dominion and ownership [of said company] from Colombia.
>
> "The Panama Canal Company had already measured, in the region washed by the bay of Almirante and by the Lagoon Chiriquí a surface of nearly 280,000 hectares when the surveyor of said company encountered a Costa Rican guard, who obliged him to desist from his measurements where the guard was stationed; but in such vast and wild solitudes not only measurements of land but acts of occupation may be effected without in a long time coming to the knowledge of the legitimate sovereign."[4]

[1]Counter-case of Costa Rica, pp. 119–127.
[2]Map No. 1 filed with Counter-Case of Costa Rica.
[3]Counter-case of Costa Rica, p. 119. Documents Annexed to the Argument of Costa Rica, vol. 2, p. 448.
[4]Documents Annexed to the Argument of Costa Rica, vol. 2, p. 478.

The map of the French Canal Company shows the westernmost concession of that Company as bordering a river named therein the Sixaola-Telire river, following approximately the actual course of the Sixaola-Yorquín rivers, from which it is evident that the river called the Telire was mistaken for the Yorquín.

Moreover it is further evident that in preparing this map the engineers of the French Company could not have intended the river they called Telire to be the Tarire of the Award, because no tributary river to the eastward of that river is shown on this map and they were not permitted to extend their surveys beyond the Yorquín river, as appears from the documents submitted in that connection in the Case of Costa Rica.[1]

It is equally evident that if President Loubet had this map before him, which cannot be doubted, he was influenced by it because it was apparently official in character.

The confidence with which it is asserted that this map was before the Arbitrator is due to the peculiar interest which the French Canal Company had at that time in the outcome of the French arbitration, as the holder of concessions from Colombia covering the vast tracts shown on this map along the Sixaola river, in the territory in dispute in this arbitration. As the situation then stood, in order to establish its title to these tracts covered by the concessions from Colombia, it was absolutely essential for the French Company that the Award should favor to the

[1]Documents Annexed to the Argument of Costa Rica, vol. 2, Doc. Nos. 375, 380, 386, 402.

utmost Colombia's claim to all the disputed territory up to the Sixaola-Yorquín line, because Costa Rica had officially notified Colombia that it would refuse to recognize these concessions in case of an award in favor of Costa Rica. This appears in the note of November 16, 1888, from the Minister of Foreign Affairs of Costa Rica to the Minister of Foreign Relations of Colombia, in which it is stated that—

> "Costa Rica will not in any way recognize, should the Award be favorable to it, the rights or concessions which might have been granted by Colombia to the Panama Canal Company over the whole or any part of the territories in litigation."[1]

This French Canal Company at the time of this arbitration was operating under the auspices of the French Government, and it cannot be doubted that the Colombian representative in that arbitration would have submitted as part of his evidence the official map of that Company, which map was calculated to show that the French Canal Company's interests would be benefited by an award in favor of Colombia.

It also appears that the French Canal Company was desirous of securing additional territory to the westward of the Yorquín inasmuch as under their concessions from Colombia, they were entitled to 500,000 hectares, only about 280,000 of which they had located on the eastern side of that river, and the engineers had attempted to extend their surveys into the territory beyond that river,[2] which territory was afterwards granted to Colombia by the French Award, as interpreted by Panama.

As already shown, Costa Rica objected to the entry of these engineers into undisputed territory,[2] and they failed

[1]Documents Annexed to the Argument of Costa Rica, vol. 2, p. 449.
[2]*Ibid.*, vol. 2, pp. 423, 448, 478.

in their purpose of surveying the territory beyond the Sixaola-Yorquín rivers, which no doubt accounts for their failure to show on this map the location of the Tarire river, and also the lack of any indications of the topography or geography of the country beyond the Sixaola.

It must be noted in this connection that the subsequent acquisition by the United States Government of the property of the French Canal Company does not reproduce in the present arbitration the situation which existed when the former award was made because the concessions from Colombia, which were then held by the French Company, covering a large part of the disputed territory, appear to have been cancelled under Article VIII of the treaty of 1903 between the United States and Panama, which provides:

> "The Republic of Panama grants to the United States all rights which it now has or hereafter may acquire to the property of the New Panama Canal Company and the Panama Railroad Company as a result of the transfer of sovereignty from the Republic of Colombia to the Republic of Panama over the Isthmus of Panama and authorizes the New Panama Canal Company to sell and transfer to the United States its rights, privileges, properties and concessions as well as the Panama Railroad and all the shares or part of the shares of that company; but the public lands situated outside of the zone described in Article II of this treaty not included in the concessions to both said enterprises and not required in the construction or operation of the Canal shall revert to the Republic of Panama, except any property now owned by or in the possession of said companies within Panama or Colon of the ports or terminals thereof.[1]

[1]Malloy's Treaties, Conventions, etc., between the United States and other Powers, 1776–1909, vol. 2, p. 1352.

The Merits of the Boundary Question.

In order to determine the merits of the boundary dispute submitted to President Loubet it is only necessary to apply properly the principle of *uti possidetis* to the established facts showing the extent of the actual possession of the territory in dispute by the respective parties to the controversy.

It has been shown in the Case of Costa Rica[1] that Central America and Colombia in entering into their treaty of 1825[2] adopted as the basis for the settlement of their boundary the principle of *uti possidetis* in accordance with the invariable custom then prevailing in Central and South America. The boundary to be determined in accordance with that treaty was in reality the boundary between the former Spanish Colonies of Costa Rica and Panama; and inasmuch as Panama and Costa Rica remained Spanish Colonies until the latter part of 1821, more than ten years after Colombia's declaration of independence, and Panama did not become part of the Republic of Colombia until 1822, it necessarily follows that the principle of *uti possidetis* to be applied for the determination of their boundary did not go back of conditions in 1821.

This was the question which they agreed to arbitrate in their first boundary arbitration treaty of 1880,[3] and it was the question submitted to President Loubet under the supplementary treaty of 1896.[4]

In the Constitution adopted by Colombia in 1886 it is stated:

> "The divisional lines separating Colombia from the adjoining nations shall be definitely fixed by public treaties, the latter being based upon the principle of *uti possidetis* of 1810."[5]

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[1]Argument of Costa Rica, pp. 61–71.
[2]Documents Annexed to the Argument of Costa Rica, Doc. No. 257, Art. 7.
[3]*Ibid.*, Doc. No. 364.
[4]*Ibid.*, Doc. No. 403.
[5]*Ibid.*, Doc. No. 371.

This declaration overlooked the fact that the territory of Panama intervened between the frontiers of Colombia and Costa Rica until 1822, as above pointed out, but as otherwise the *uti possidetis* of 1810 and of 1822 were the same, this mistake was immaterial.

The evidence presented in the Case of Costa Rica shows that when Panama and Costa Rica were colonies of Spain, until 1821, their boundary on the Atlantic side of the isthmus, which is the only part of the boundary now under consideration, extended from the Escudo de Veragua along the course of the Chiriquí river[1] to its headwaters, and thence to the Main Cordillera in the general direction of the Chiriquí Viejo river, to the east of Punta Burica.

It has also been shown that in Costa Rica's Constitution[2] adopted in 1825, which was known to Colombia when their treaty of 1825 was ratified and exchanged, this boundary was described as terminating at the Escudo de Veragua, and that so far as Panama is concerned, apart from Colombia, this boundary was never questioned, and also that in the treaty of 1841 between Panama and Costa Rica, when Panama had separated from New Granada, the reference to the "divisional line located at the Escudo de Veragua" was virtually a recognition of Costa Rica's contention that their boundary was located there.[3]

It also appears from the evidence already presented that until 1870 Costa Rica had always been in uninterrupted and undisputed possession of all the territory claimed by Colombia in the French Arbitration to the

[1]Documents Annexed to the Argument of Costa Rica, vol. 2, Doc. Nos. 259, 262, 265, 266, 271, 283 at pp. 76–77, 287, 303 at p. 203, 366 at pp. 392–397, pp. 402-403; Opinion of Moret and Paredes.

[2]*Ibid.*, Doc. No 255.

[3]*Ibid.*, Doc. No. 277, Doc. No. 278.

westward of the Changuinola river,[1] which up to that date had been the utmost limit of Colombia's pretensions,[2] and that Colombia's only claim to possession of any of the territory in dispute eastward of that river rested on the temporary occupation in 1836 of the Island of Boca del Toro, and some subsequent spasmodic efforts to establish settlements at a few isolated points on the shore of the Bocas del Toro region.[3] The record further shows that these acts of aggression on the part of Colombia were suffered by Costa Rica by reason of necessity, and always under protest and without any admission of Colombia's right or title which could be regarded as impairing Costa Rica's right and title to this territory under the principles of international law as recognized and adopted in the treaty of 1825 with Colombia.[4]

It further appears from the evidence in the Case[5] that in the treaty between Costa Rica and Colombia, which was negotiated in 1873, the boundary line agreed to extended along the Bananos river, which is to the eastward of the Changuinola river, thus reducing Colombia's previous contentions; and when that treaty failed of ratification, Colombia in anticipation of arbitration, which was then recognized as inevitable, proceeded to establish a small settlement between the Changuinola and the Sixaola rivers, for the purpose of extending the scope of the arbitration, and strengthening as far as possible her

[1]Argument of Costa Rica, pp. 76, 385–392; Documents Annexed to the Argument of Costa Rica, vol. 2, Doc. Nos. 269, 324.

[2]Argument of Costa Rica, pp. 76–81, 436–447; Documents Annexed to the Argument of Costa Rica, vol. 2, Docs. Nos. 272, 294, 295, 298, at p. 133; Counter case of Costa Rica, pp. 265–276.

[3]Documents Annexed to the Argument of Costa Rica, vol. 2, Doc. Nos. 275; 283 at p. 72 *et seq.;* 286 at pp. 84–85; 287; 298 at pp. 141–143, 147; 300 at p. 153; 478.

[4]Argument of Costa Rica, pp. 16–21, 72–112; Documents Annexed to the Argument of Costa Rica, vol. 2, Docs. Nos. 253; 273; 295; 296; 302 at p. 163, p. 167; 303 at pp. 189–190; 317.

[5]Argument of Costa Rica, p. 111; Documents Annexed to the Argument of Costa Rica, vol. 2, Doc. No. 334.

claim to the possession of that territory.[1] This was the only other important change in the situation between 1870 and 1880 when the first arbitration treaty was made.

Throughout the whole period covered by these encroachments by Colombia, upon the territory of the former province of Costa Rica, no part of the vast regions between the Escudo de Veragua and the Sixaola river was in the actual possession of Colombia with the exception of a few unimportant and isolated settlements, most of which were only of a temporary character located on the islands or on the shore along the coast.[2] The situation above outlined as to the possession by Colombia and Costa Rica respectively of the territory in dispute between them, remained unchanged from 1880 until the settlement of that dispute was submitted to the arbitration of the President of the French Republic in 1897, under their treaty of 1896.[3]

During the period covered by these developments the treaties of 1856[4] and 1865[5] also were negotiated as well as the treaty of 1873,[6] but none of these treaties were ratified. By the modifications introduced in the first one by Colombia, she attempted to fix the boundary at the Sixaola-Yorquín rivers, and Costa Rica yielding to the pressure of the misfortunes of war and the plague was prepared to assent to a boundary at the Changuinola river, but by the later treaty of 1865 when normal conditions had been reestablished, the boundary agreed upon

[1]Argument of Costa Rica, pp. 107-111; Documents Annexed to the Argument of Costa Rica, vol. 2, Doc. Nos. 375 at p. 424; 380 at p. 452.

[2]Argument of Costa Rica, pp. 385–394, pp. 407–417, 459-507.

[3]Argument of Costa Rica, pp. 394–398; Documents Annexed to the Argument of Costa Rica, Annex I, vol. 3, pp. 133–448; vol. 4, Doc. Nos. 580, 581, 582, 583.

[4]Documents Annexed to the Argument of Costa Rica, vol. 2, Doc. No. 307.

[5]*Ibid.*, Doc. No. 323.

[6]*Ibid.*, Doc. No. 334.

was the Cañaveral river, which closely approximated Costa Rica's original colonial boundary along the Chiriquí river to the Escudo de Veragua.[1]

These facts showing the extent and character of the possession exercised by Costa Rica and Colombia, respectively, over the territory in dispute from the time the dispute originated down to the time of the French Arbitration, are uncontradicted and unquestioned, and were all in evidence in that arbitration.

These being the facts of the case as to possession, and the law to be applied, as has already been shown, being the principle of *uti possidetis* in 1821, it is obvious that neither the facts nor the law furnish any justification for carrying the boundary to the westward of the Sixaola river, and that rightly it should not have been carried even so far to the westward as the Changuinola. The opinion of the learned Spanish jurists Don Segismundo Moret y Prendergast and Don Vicente Santamaría de Paredes, which forms part of the Case of Costa Rica, demonstrates that the Chiriquí, rather than the Changuinola would have been fixed as the boundary if Colombia had not refused to go on with the arbitration before the King of Spain[2] under the supplemental arbitration treaty of 1886[3]; in the preamble of which it was recited that it was to the interests of both parties to continue the arbitration before the Spanish Government "not only because the greater part of the original documents for deciding with certainty and full knowledge of the matter the pending question of boundaries are to be found in the archives of Spain, but also because there are to be found there a

[1]Argument of Costa Rica, pp. 83–107.
[2]Documents Annexed to the Argument of Costa Rica, vol. 2, Doc. Nos. 383, 385, 396, at p. 496, Doc. No .401.
[3]*Ibid.*, Doc. No. 369.

sufficient number of persons especially devoted to investigations concerning America, whose opinion and counsel will efficiently contribute to the adjustment of the award as far as possible to the truth and to justice."

It must be concluded, therefore, that the line proposed in the Loubet Award lying to the westward of the Sixaola river in territory which had been continuously in the undisputed possession of Costa Rica from the beginning of its colonial history was based upon a misunderstanding of the facts, or a misapprehension of the law to be applied, for it is otherwise inexplicable. It cannot be explained on the theory that it was the intention of the award to give effect to the Royal order of 1803 under which Colombia asserted a claim to the Mosquito Coast for that would imply a total disregard of the controlling principle of *uti possidetis* in view of the fact that Colombia never had actual or even constructive possession of any territory beyond the Sixaola-Yorquín rivers. It is true that Colombia in anticipation of this difficulty sought to change the principle of *uti possidetis* by adding the words "de jure" in the hope of giving a mere claim of right to possession the same value as a claim to ownership based upon actual possession. But whatever may be the value of this new principle of *uti possidetis de jure*, and even if it were permissible to apply it in that arbitration, it called for proof that the Royal Order of 1803 furnished a valid basis for a claim by Colombia of the right to possession of territory held in actual possession by Costa Rica. That this Royal Order had no value as a basis for any such claim has been abundantly proved by the arguments and evidence presented in the Case[1] and Counter-case[2] of Costa Rica, wherein it is shown that it must be dis-

[1]Argument of Costa Rica, pp. 508–623.
[2]Counter-case of Costa Rica, pp. 54–85.

regarded for many reasons, the most important of which are the following:

1. This order was issued for a military and not for a political purpose; and, therefore, was not intended to change political divisions of territory.

2. A royal order could not change political divisions of provinces, for that could only be done by a royal *cédula* in distinction from a royal order, one being the act of the King himself, and the other merely of his minister.

3. The order of 1803 never became operative, and in fact was superseded and annulled by subsequent orders.

4. Being a revocable order it in no event could be regarded as having any effect after 1810, when Colombia declared its independence of Spain, and the Mosquito Coast remained under Spanish jurisdiction.

5. The Mosquito Coast proper never extended eastward further than Punta Gorda, which is more than ten leagues to the westward of the San Juan river, and as the order in terms applied only to a part of the existing Mosquito Coast, it could not be construed as extending that coast beyond its recognized limits.

6. The Mosquito Coast consisted only of a narrow strip of the shore or littoral along the extreme edge of the Coast, and, therefore, even admitting *arguendo* that it originally extended as far to the eastward as the Sixaola river, as claimed by Colombia, it would furnish no justification for carrying the boundary to the westward of the Sixaola river back from the coast and into the interior of the Province of Talamanca.

That the Royal order of 1803 was not relied upon in the Loubet Award as the justification for carrying the boundary beyond the Sixaola river, is evident from the rejection in that Award of Colombia's claim, under that

Order, of title to the Atlantic littoral of Costa Rica as part of the Mosquito Coast.[1]

The merits of this question may also be determined by taking into consideration, in connection with the facts above set forth, Costa Rica's title by prescription, which was invoked in the Case of Costa Rica,[2] and confirms in all respects the conclusions reached under the application of the principle of *uti possidetis*.

As stated in the Case of Costa Rica, the situation and conditions above shown demonstrate that the title asserted by Costa Rica to all the territory under consideration to the west of the Changuinola river was valid, and should be sustained not only on the principle of *uti possidetis* of 1821, but also on the ground of undisturbed and unchallenged possession from time immemorial up to 1821, when that principle was adopted in recognition of such possession, and also by reason of the uninterrupted continuance of such possession since 1821 down to the present time, there never having been any adverse holding of any part of the above-mentioned territory until a very few years before arbitration was agreed upon under the treaty of 1880, since which time, and pending arbitration, the occupation of a portion of that territory must be regarded as without prejudice to the rights of Costa Rica, which had previously been established.[2]

Extent of the Former Arbitrator's Jurisdiction.

Not only was the former Arbitrator required under the terms of submission, as has already been shown, to determine the location of the boundary in accordance with the principle of *uti possidetis* in 1821, but his jurisdiction was

[1] Argument of Costa Rica, p. 262; Synopsis, p. xxiv.
[2] *Ibid.*, p. 453.

further limited by article 3 of the treaty of 1886,[1] which required him to confine the boundary to be fixed by the award within the territory then actually in dispute between the two parties.

It is admitted in the Case of Panama that—

> "if any part of the line fixed by President Loubet did, in fact, lie outside the limits fixed by the convention of 1886, that part would require modification and it would be necessary for the present Arbitrator to substitute for it such line as he should determine to be 'most in accordance with' what he should find to be the 'true intention, of the Award."[2]

It has been necessary, therefore, to consider what territory was actually in dispute within the meaning of article 3 of the treaty of 1886.

On this point the position taken in Panama's Case is as follows:

> "No claim was made by either party as to interior lines and nothing in the treaty prescribes any rule upon the subject. So long as the terminal points upon the two coasts were within those stated, he was at complete liberty, in the interior, to connect them by a line running in whatever course he should think proper."[3]

But it must be noted that although the course of the line claimed by Colombia between the two extreme points named by Colombia, was not described in that treaty, the limiting clause nevertheless made it necessary to confine the boundary to territory actually in dispute between the two Governments when that treaty was made.

[1]Documents Annexed to the Argument of Costa Rica, Vol. 2, Doc. No. 369.
[2]Argument of Panama, p. 10.
[3]*Ibid*, p. 9.

It is pointed out in the case of Costa Rica (Synopsis XX) that in considering this question of disputed territory for the purpose of determining the limitation imposed thereby on the scope of the award, it must be remembered that the question relates to two entirely different sections of non-contiguous territories, each having a distinctly different historical and legal status.

One of these sections consisted of a narrow strip of the shore or littoral along the Atlantic, known as the Mosquito Coast, and the other section consisted of a strip of territory extending across the isthmus from the Atlantic to the Pacific.[1]

So far as this latter section of territory is concerned, the evidence and arguments presented in the Case and Counter-Case of Costa Rica have demonstrated that in 1880 Colombia's claim to the interior territory back from the coast did not extend beyond the course of the Sixaola-Yorquin Rivers,[2] and that between 1880 and 1886, this claim was in no way extended, and thereafter remained unchanged until the so-called Silvela line was proposed in the course of the French arbitration; and obviously no claim made subsequent to 1886 could operate to extend the limits of the territory actually in dispute in 1886. It should be noted in this connection, however, as has already been pointed out in the Case of Costa Rica that Colombia's proposal of this Silvela line was in effect an admission that a part of the territory which Panama now claims as granted to it under the Loubet award, was outside of the territory in dispute in 1886.[3]

[1]Argument of Costa Rica, pp. 258–262; Synopsis, p. XX.
[2]Argument of Costa Rica, pp. 241–248; Synopsis, p. XXXIII, Counter-case, pp. 22, 42–50.
[3]Argument of Costa Rica, pp. 161–164, 376; Synopsis, p. XXXIV.

It is evident, therefore, in view of all the facts already established that it never has been and cannot be questioned that, apart from Colombia's claim to the Mosquito Coast, the territory in dispute in 1886 did not extend to the westward of the Sixaola–Yorquin Rivers and that a boundary line extending beyond that territory is wholly without justification unless some justification for it can be found in the Mosquito Coast claim, which now remains to be considered.

Attention has already been called to the fact that Colombia's contention that the Mosquito Coast extended along the Atlantic littoral of Costa Rica was rejected by President Loubet,[1] and it has likewise been shown that the claim asserted by Colombia in the French Arbitration of a right to the possession of the Atlantic littoral of Costa Rica depended wholly upon the Royal Order of 1803, which Order has been found worthless as a basis of title even as to the Mosquito Coast proper.

The failure of Colombia's contention in regard to the Mosquito Coast destroys any possibility of finding therein a justification for carrying the line to the westward of the Sixaola River, even on the extreme edge of the coast, and in this connection it should also be observed that even if Colombia's claim to the Mosquito Coast had not failed, it could by no possibility have justified President Loubet in carrying the boundary into the interior to the westward of the Sixaola River, because the Mosquito Coast did not, and Colombia never claimed that it did, extend inland back of the narrow strip of shore described as the littoral.[2]

Shortly before the arbitration treaty of December 25, 1880, between Costa Rica and Colombia was entered into,

[1]Argument of Costa Rica, p. 262; Synopsis, p. XXIV.

[2]Documents Annexed to the Argument of Costa Rica, Vol. 2, Docs. Nos. 283, 303 at pp. 183–184.

there was a renewal of interest on the part of Colombia in the Mosquito Coast claim, on account of the anticipated construction of an interoceanic canal along the Nicaraguan route through the San Juan River, the prospect of which had once before been responsible for exaggerated pretentions on the part of Colombia.[1] On June 28, 1880, the Colombian Secretary of Foreign Relations wrote to the Nicaraguan Minister at Managua that—

> "The proposed enterprise of the excavation of a canal between the Atlantic and Pacific Oceans, at the Isthmus of Panama, or at some other point in Central America, has led to some recent investigations, published in the press, concerning the rights of this Republic in the territorial zone which extends on the Atlantic side between the River Doraces or Culebras and the Cape Gracias á Dios."[2]

And he added that Colombia was desirous that the boundary question referred to should be settled by diplomacy, or failing that by arbitration.

In reply to this note the Minister of Foreign Relations of Nicaragua wrote to the Minister of Foreign Relations of Colombia on September 16, 1880, stating that—

> "As regards the question to which Your Excellency refers, my Government has not been able to give to it the importance which at first sight its gravity and possible serious character would have, because it never has been presented by that of Colombia to the consideration of that of Nicaragua, which does not know in any official way the bases upon which any claim of that character could be supported, if it were disposed to formally submit it.

[1]Documents Annexed to the Argument of Costa Rica, Vol. 2, Doc. No. 283 at pp. 72, 76.

[2]Documents Annexed to the Argument of Costa Rica, Vol. 2, p. 397; Doc. No. 366 at pp. 392-398.

> The rights of Nicaragua over the territory which extends on the Atlantic Coast from Cape Gracias a Dios to its frontier with the Republic of Costa Rica, have been recognized from a far distant epoch by all the nations with whom it has cultivated friendly relations; its extended possession of that littoral, never disputed by any one, and the exercise of jurisdictional acts without opposition by any party who might be supposed to have a better right, constitute a title of such clear and unquestionable character that my Government cannot admit the possibility of it being put in doubt with any colour of justice."[1]

The Minister of Foreign Relations of Nicaragua transmitted a copy of this correspondence on September 21, 1880 to the Minister of Foreign Relations of Guatemala, who replied on October 16, 1880, approving of the view expressed by the Nicaraguan Government that inasmuch as there was no doubt as to the rights of Nicaragua in the territory claimed to be in dispute, there was nothing to arbitrate, and he added—

> "It has been stated and many times repeated, that the King of Spain indicated as to the end of Central America the "Escudo de Veragua," on the Atlantic side, and the Point of "Burica" on the Pacific.
>
> These limits were recognized by the Sovereigns of the House of Austria and the Bourbons, from Philip II down to Fernando VII.
>
> For Colombia to have acquired any territorial property on this side of the "Escudo de Veragua," it is necessary for it to have a title transferring the dominion, since under the Law of Nations as well as by Civil Law property can only be acquired by legitimate means.
>
> The Government of Colombia has never submitted a title of that character, which changes the limits

[1]Documents Annexed to the Argument of Costa Rica, Vol. 2, p. 400.

> between the Viceroyalty of Santa Fe, and the Captaincy-General marked out by the Kings of Castile."[1]

A valuable exposition then follows from this disinterested source showing the justice of Costa Rica's contention that the ancient boundary between Central America and Colombia was located at the Escudo de Veragua, and he adds—

> "This was well understood by the Governments of Colombia prior to the recent investigations concerning the excavation of the Canal, for neither General Herran, nor Valenzuela, nor Pradilla, nor Correoso, who at various times have celebrated boundary treaties between New Granada or the United States of Colombia and Central America ever made such extreme claims."[2]

In connection with this correspondence, the note of April 20, 1880,[3] from the Minister of Foreign Relations of Colombia to the Minister of Foreign Relations of Costa Rica, should also be read, for in that note the same question is tentatively raised with Costa Rica by the allegation that "by virtue of the uti possidetis of 1810, and firmly based upon authentic and irrefutable documents the boundaries of Colombia extend on that [Atlantic] side as far as Cape Gracias a Dios, embracing all of the Mosquito Coast on the Atlantic."

That the Mosquito Coast did not extend below the Costa Rican-Nicaraguan boundary was well understood at that time,[4] and that Colombia never having been in

[1]Documents Annexed to the Argument of Costa Rica, Vol. 2, p. 402.
[2]*Ibid.*, p. 403; Doc. No. 366.
[3]*Ibid.*, Doc. No. 352.
[4]*Ibid.*, Docs. Nos. 283, 298, 308, 378.

actual possession of that Coast could not base a claim to it on the ground of uti possidetis of 1810 or any other year was also well known; and it was also well understood at the time the treaty of 1880 was entered into, that Colombia's only interest in this claim to the Mosquito Coast was due to the desire of Colombia to secure or at least participate in the control of the Atlantic terminus of the proposed Nicaraguan Canal, which had no relation to the coast of Costa Rica to the south of the San Juan River.[1]

In the conclusions adopted by the Colombian Senate on July 14, 1880, in regard to the settlement of the boundary with Costa Rica it is significant that all reference to a title to the Mosquito Coast by virtue of the uti possidetis in 1810, was omitted, the conclusion on this point being—

> "(2) Colombia has titles which accredit its right, emanating from the King of Spain, to the Atlantic littoral embraced from the mouth of the River Culebras as far as Cape Gracias a Dios."[2]

This conclusion is also significant from the fact that it was omitted from the proclamation of the President of Colombia making public the other conclusions adopted at the same time, which had no relation to the Mosquito Coast, and it was not communicated to Costa Rica at the time the treaty of 1880 was entered into; for these reasons it is otherwise of no importance in the present discussion, and may be disregarded.[3]

The real position of Colombia with reference to the Atlantic littoral beyond the so-called River Culebras was

[1]Documents Annexed to the Argument of Costa Rica, Vol. 2, Docs. Nos. 384, at p. 469; 386 at p. 475.

[2]*Ibid.*, p. 366.

[3]Argument of Costa Rica, pp. 119–133; Documents Annexed to the Argument of Costa Rica, Vol. 2, Doc. No. 361.

stated once for all in the report of Senor Madrid in 1852,[1] which was substantially the same report prepared by him and adopted by the Colombian Senate in 1855.[2] He there said—

> "What the Spanish Government maintained, as Your Worship knows perfectly well, and what the geographers and navigators of America have always understood as the Coast of Mosquitos, is that which extends for more than a hundred and eighty leagues along the Atlantic littoral of this continent, beginning on the westward at Punta Castilla or Cape Honduras, the boundary which separates it from the bay of that name, latitude 16° North. From its start at that point, the Coast of Mosquitos continues in an easterly direction, forming a somewhat obtuse angle toward Cape Gracias a Dios, and running from that point in a North-South direction it terminates at Punta Gorda, near the most northern arm of the River San Juan de Nicaragua at 11° North latitude.
>
> This coast, made up of the old native provinces of Taguzgalpa and Tologalpa, in the first years following their discovery, made by Columbus in person, was included within one of the two primitive governments conferred upon Alonzo de Ojeda and Diego de Nicuesa; but as soon as the Captaincy-General of Guatemala was organized the whole Coast of Mosquitos was placed under the immediate dependency of the Intendants of Comayagua or Honduras, although the portion of the coast which extends from Cape Gracias a Dios towards the South was subsequently segregated from the Presidency of Guatemala and added, at one time to the Captaincy-General of the Island of Cuba, and at another to the Viceroyalty

[1]Documents Annexed to the Argument of Costa Rica, Vol. 2, Doc. No. 298.

[2]Argument of Costa Rica, pp. 83-90, 95: Documents Annexed to the Argument of Costa Rica, Vol. 2, Doc. No. 302.

of the New Kingdom of Granada, because it was easier to watch over and protect it from the maritime stations of Havana and Cartagena than from the naval station of Veracruz.

The portion of the coast mentioned, that is to say, that embraced from Cape Gracias a Dios towards the South, was, as has been said, directed to be added to the New Kingdom of Granada, in the time of the Viceroys, Flores and Gongora, by whose reports, which can be referred to in the copies that are on file in the library of national works, it was reincorporated in the Captaincy-General and Audiencia of Guatemala, until by the Royal cedula of November 30, 1803, it was definitely added anew to the Viceroyalty of Santa Fe, or New Granada, together with the Islands of San Andres, conferring the government of the latter upon Don Tomas O'Neylly.

Our title to the dominion of the Coast of Mosquitos and of the Island of San Andres mentioned, as being placed *quoad hoc* in the stead of Spain, is founded upon the Royal Order cited."[1]

Among the conclusions reached by Senor Madrid in this report was the following:

"2. Our title to the dominion of the Coast of Mosquitos, reduced to the onerous duty which was imposed upon us by the Royal Order of November 30, 1803, *is worth nothing*, nor is it of any utility for ourselves; we ought to get rid of it, in such a way that it may not make us troubles of another kind."[2]

He further added—

"But there is still more, and that is that if on the one hand the task of recovering the Coast of Mosquitos is greater than our strength, on the other hand *the*

[1]Documents Annexed to the Argument of Costa Rica, Vol. 2, pp. 109–112.
[2]*Ibid.*, p. 125.

title that we have to the dominion of that territory is of such an anomalous and indefinite nature, that strictly it would be reduced to the duty of affording it the maritime protection it might need for its coast guard against outside aggressions. It appears very certain that in view of all the circumstances of the case this appears to have been the intention with which the Spanish Government issued the Cedula of 1803; *since by it there was not then added to New Granada any integral province or territory, but simply a portion of the Coast of Mosquitos;* and by coasts cannot be understood the districts of the interior country, *nor even the littoral establishments of Moin, or Salt-Creek, San Juan de Nicaragua, or Greytown and Laguna de Perlas or Bluefields, which always were, as they continued after the issue of that order, exclusively dependent upon Central America.*

Under this interpretation, which seems to be the only one that harmonizes well with that document, the dominion we have derived from Spain over the said territory would be left reduced to the islands, which undoubtedly are embraced under the designation of 'coasts,' and to an extension of beach, littoral or shore of the sea, exceedingly difficult to mark out and of which we have absolutely no need. We ought, therefore, to make haste to cede it to the States of Central America *in exchange for securing in the interior of the Isthmus,* taking advantage for that purpose of any favorable opportunity, a *frontier demarcation which would avoid all reason for doubt or dispute in future,* or at least marking out for us the Coast of Mosquitos, fixing towards the north-west upon both oceans the boundary of our territory at conspicuous points and in a permanent and positive manner, provided that this can be carried out without compromising any principle engaging our security and without diminishing directly or indirectly our right to the other territories which belong to us."[1]

[1]Documents Annexed to the Argument of Costa Rica, Vol. 2, pp. 126–127.

It was soon after the adoption of this report that William Walker and his band of adventurers entered upon the conquest of Nicaragua, and in the struggle which ensued, involving Costa Rica as well as Nicaragua, New Granada distinctly recognized the territorial sovereignty of Nicaragua over the Mosquito Coast, which was jeopardized in that conflict; thus in effect denying for itself any territorial rights in that coast, all of which is fully set forth in the Counter-case of Costa Rica.[1]

Notwithstanding the fact that before the supplementary arbitration treaty of 1886 was entered into, the Panama route had been selected for the interoceanic canal, and the construction of a canal there was already under way, Colombia still anticipating that a canal might be built along the Nicaraguan route, on account of the interest displayed by the United States in that route, and in order not to prejudice or relinquish by implication the possibility of establishing a claim in the future to the part of the Nicaraguan coast at the mouth of the Canal, so that it might participate in the control of a canal along that route, Colombia insisted upon inserting in the treaty of 1886, the reference to Cape Gracias a Dios as the extreme point of the boundary claimed by it on the Atlantic. For the reasons already explained, the purpose and effect of this was well understood by Costa Rica and it stands to reason that it would not have been permitted, if Costa Rica had for a moment believed that as a result of it the possession of the entire Atlantic waterfront of Costa Rica, including the city of Limón, with its immensely valuable port and the railway terminal there, and all the national interests both public and private along that coast, would be subjected to the hazard of arbitration.[2]

[1]Counter-case, Chapter VI, p. 277, *et seq.* Appendix No. 3, Annex 2.
[2]*Ibid.*, pp. 44–50, 92–94.

Moreover, even if the dispute as to the Mosquito Coast could be regarded as relating to the Costa Rican littoral below the San Juan River, it was not a boundary dispute, but a question of title to territory always held by Costa Rica as to the possession of which no question had ever arisen, and no formal demand for the surrender of which had ever been made by Colombia upon Costa Rica. In the treaty of 1880 it was recited in the preamble that the question to be arbitrated was "none other than the question of boundaries, foreseen in articles 7 and 8 of the Convention of March 15, 1825, between Central America and Colombia, which has recently been the subject of various treaties between Costa Rica and Colombia, none of which were ratified." This was a totally different question from a dispute as to the title of one of the parties to territory which had always been in the unquestioned possession of the other.[1]

IV.

CORRECT INTERPRETATION AND TRUE INTENTION OF THE LOUBET AWARD.

As hereinabove pointed out, the interpretation of the Loubet Award is controlled by the intention attributable to President Loubet in view of all the facts, circumstances and considerations having a bearing on the case, which the present Arbitrator is required to take into account.

The purpose of the foregoing discussion has been to show that the award line is defective, and requires reformation because of its uncertainty and ambiguity,

[1]Argument of Costa Rica, pp. 133–141; Counter-case of Costa Rica, pp. 22–42.

because it is not in accordance with the merits of the boundary question submitted to President Loubet, because it rests upon a misunderstanding of the facts and the law to be applied and because it extends through territory which was not within the scope of the former arbitration, and otherwise exceeds the jurisdiction of the former Arbitrator.

The line of the award being objectionable, and impossible for these reasons, it therefore becomes necessary to consider what intent, under these circumstances should be attributed to the Loubet Award in order to determine where the line should be fixed in the present arbitration.

One of the most conspicuous features of the history of this controversy is that from the beginning of the discussion, back in the days of Spanish control, down to the time when the question was first submitted to arbitration, every one of the many boundaries which have been suggested and considered on the Atlantic side of the Main Cordillera has been a river boundary. This seems to have been entirely overlooked by President Loubet, and it was doubtless in order to excuse this oversight and give some appearance of regularity to the award line that Panama stated in its Case that—

> "In accordance with the usual practice at the present day, this boundary follows the summit of successive watersheds."[1]

The practice of the present day is of very little importance compared to the practice pointed out by the historical antecedents of this discussion, which was to adopt a river boundary as was done in the treaties of 1856, 1865 and 1873, and as was always contemplated by

[1]Argument of Panama, p. 14.

both parties to the controversy in their other contentions as to the location of the boundary.[1]

In this connection attention is called to the very extensive list of rivers adopted as international boundaries, and the discussion as to the present day practice which is presented in the Counter-case of Costa Rica,[2] showing that the desire of the parties to this controversy to adopt a river boundary was in accordance with the almost universal practice.

A most distinguished and important example of the custom of fixing international boundaries in Central America along the course of a river, is found in the award rendered on December 23, 1906, by the King of Spain in the boundary arbitration between Honduras and Nicaragua, in which it appears that although the arbitrator adopted Cape Gracias a Dios as the terminal point of the boundary, nevertheless instead of starting the boundary at that point, he carried it along the course of a nearby river for the reasons stated in the following extracts from that award:

> "Considering that from Cape Gracias a Dios there is no great cordillera beginning, which from its character and direction could be taken as the frontier between the two States, to start from that point, and that, on the other hand, there is presented at the same place, as a perfectly marked boundary, the outlet and course of a river as important and carrying so much water as that called Coco, Segovia or Wanks;
>
> Considering that since the course of this river, at least in a great part thereof, presents from its direction and the circumstances of its flow, *the most natural and most precise boundary that could be desired;*

[1]Argument of Costa Rica, p. 356–360. Documents Annexed to the Argument of Costa Rica, Vol. 2, Docs. Nos. 267, 272, 298, 302, 361.

[2]Counter-case, p. 226.

Considering that this same river Coco, Segovia or Wanks, in a great part of its course, has figured and does figure in many maps, public documents and geographical descriptions, as the frontier between Honduras and Nicaragua;

* * * * * * *

Considering that it is necessary to fix a point at which the course of this River Coco, Segovia or Wanks should be abandoned, before proceeding to the Southwest to go inland into territory recognized as Nicaraguan;

Considering that the point which best unites the conditions required in that case, is the place where the said River Coco or Segovia receives, on its left bank, the waters of its tributary the Poteca or Bodega."[1]

The boundary fixed by that award was as follows:

"Starting from the mouth of the Segovia or Coco, the frontier line shall follow by the meandering of valley course (thalweg) of this river, going upstream, without interruption until arriving from this point, the said frontier line shall leave the River Segovia, continuing by the meanders of the said affluent Petaca or Bodega, and following up-stream to the junction with the River Guineo or Namasli.

From this junction the divisional line shall take the direction that corresponds to the demarcation of the site of Teotecacinte, with reference to the demarcation made in 1720, to end in the Portillo de Teotecacinte, in such manner that said site shall wholly remain within the jurisdiction of Nicaragua."[2]

In order to meet the requirements of the situation thus presented and attributing to the Loubet Award the intention to meet these requirements, it is necessary that the award should be so interpreted as to fix the boundary

[1]Documents Annexed to the Argument of Costa Rica, Vol. 2, pp. 601-602.

along the course of a river, so far as possible, which in the language of the award of the King of Spain above quoted, is "the most natural and most precise boundary that could be desired."

It is also necessary in interpreting the Loubet Award to bear in mind that the case of Panama is devoid of any proof showing that Panama after separating from Colombia was entitled to stand fully in the place of Colombia with reference to any of the territory now in dispute, and it will be remembered that none of the claims made by Colombia to ownership of territory to the westward of the Escudo de Veragua, the original boundary of Panama, were ever asserted on the ground that such territory was part of or belonged to Panama.[1] It was demonstrated in the Case of Costa Rica[2] that with respect to the territory situated to the northwest of the Culebras River, the present Republic of Panama cannot invoke the title of an heir of Colombia for the purpose of claiming the sovereignty of any of the territory held by Costa Rica. Certainly no part of the territory to the westward of the status quo line of 1880, along the Sixaola-Yorquin Rivers, was in the possession of Colombia in 1903, or has since been in possession of Panama, and Panama has offered no evidence in this arbitration to show that the inhabitants of any part of the disputed territory have elected to become subject to the new Republic of Panama.

In the light of these changed conditions, which have arisen since the Loubet Award was rendered, certainly no intention can be attributed to it which would have the effect of transferring from Costa Rica to Panama the possession of any territory as to which Colombia's claim has not been inherited by Panama.

[1]Argument of Costa Rica, pp. 45–50.
[2]*Ibid.*, p. 49.

The other considerations, facts and circumstances which must be taken into account in determining the true intention of the Loubet Award have already been mentioned.

CONCLUSION.

Inasmuch, therefore, as it must be presumed for the reasons already discussed, that the true intention of the Loubet Award was to locate the boundary in accordance with the merits of the question, taking into consideration the facts and the law applicable thereto, and all the other circumstances and considerations which the present Arbitrator is required to take into account in deciding this question, it necessarily follows that the boundary line contended for by Costa Rica must be presumed to be the line most in accordance with the correct interpretation and true intention of the Loubet Award, all of which is more fully set forth in the Counter-case of Costa Rica, which follows.

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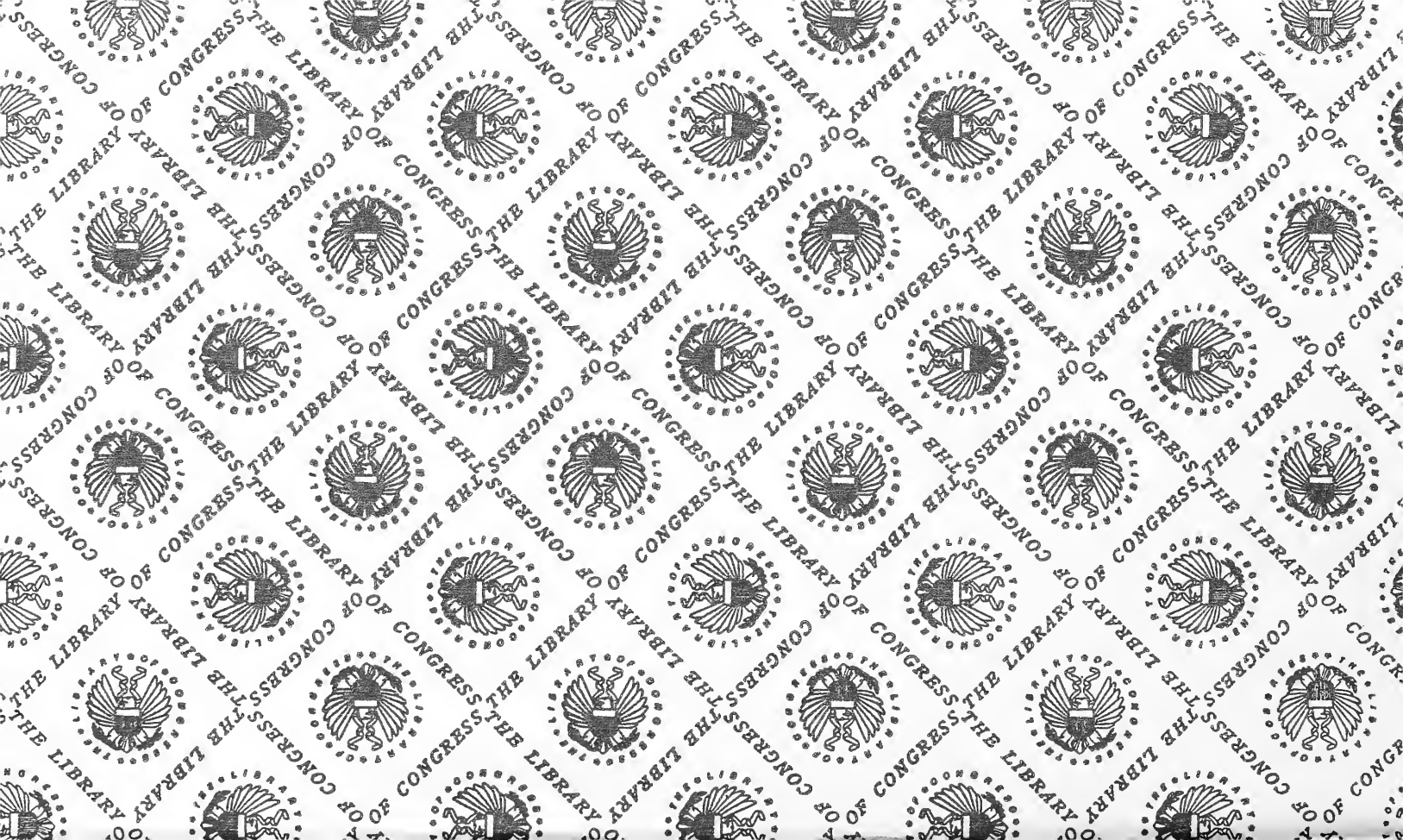
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